



# Request for Proposals (Revised)

<b>BID OPENING:</b> <b>DATE:</b> August 8, 2017 <b>TIME:</b> 11:00 A.M. EST <b>REQUEST FOR PROPOSALS NUMBER:</b> <b>23062</b>	<b>TITLE: Group 79008 – BANK CARD SERVICES (FUEL CARD SERVICES) (Statewide)</b>  <b>Classification Codes: 15, 84</b>
<b>CONTRACT PERIOD:</b> June 22, 2018 – June 21, 2021 with the possibility of extensions up to two (2) additional years	
<b>DESIGNATED CONTACTS:</b> In accordance with the Procurement Lobbying Law [State Finance Law § 139-j(2)(a)], the following individuals are the Designated Contacts for this Solicitation. All questions relating to this Solicitation must be addressed to the Designated Contacts.  Email Address: <a href="mailto:ogs.sm.PS_CM_FleetFuelRoads@ogs.ny.gov">ogs.sm.PS_CM_FleetFuelRoads@ogs.ny.gov</a>	
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<b>For MWBE Questions Only</b> [USE ONLY WHERE APPLICABLE, i.e. where the Solicitation has goals]:	<b>For SDVOB Questions Only</b> [USE ONLY WHERE APPLICABLE, i.e. where the Solicitation has goals]:
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<b>For INSURANCE Questions Only</b>	
Email Address: <a href="mailto:ogs.sm.insrev@ogs.ny.gov">ogs.sm.insrev@ogs.ny.gov</a>	
Leighann Brown	Telephone No. (518) 457-6595

<b>Bidder's Federal Tax Identification Number:</b> (Do Not Use Social Security Number)		<b>NYS Vendor Identification Number:</b> (See New York State Vendor File Registration Clause)		
Legal Business Name of Company Bidding:				
D/B/A – Doing Business As (if applicable):				
Street	City	State	County	Zip Code
E-mail Address:		Company Web Site:		

If applicable, place an "x" in the appropriate box(es) (check all that apply)			
<input type="checkbox"/> NYS Small Business # Employees	<input type="checkbox"/> Service Disabled Veteran Owned Business	<input type="checkbox"/> NYS Minority Owned Business	<input type="checkbox"/> NYS Women Owned Business

If you are not bidding, place an "x" in the box and return this page only.	
<input type="checkbox"/> WE ARE NOT BIDDING AT THIS TIME BECAUSE:	

<b>FOR PROCUREMENT SERVICES USE ONLY</b>				
LITERATURE <input type="checkbox"/>	LETTER <input type="checkbox"/>	FLASH DRIVE <input type="checkbox"/>	OTHER <input type="checkbox"/>	# of Binders/Packages: _____
PURC. MEMO <input type="checkbox"/>	CD/DVD <input type="checkbox"/>	SDHC CARD <input type="checkbox"/>	_____	Documented by: _____

## Bidder Certification and Affirmation

Bidder certifies and affirms as follows:

1. This Bid is an irrevocable offer for 60 days from the date of submission to the New York State (“NYS”) Office of General Services (“OGS”), or for such longer period as is set forth in the Invitation for Bids.
2. The Bidder can and will provide and make available, at a minimum, the Products, deliverables and/or services as described in the Invitation for Bids.
3. The Bidder has read and understands the provisions of the Invitation for Bids, and all appendices, attachments, and exhibits attached thereto, including Appendix A (Standard Clauses for New York State Contracts) and Appendix B (General Specifications).
4. The information contained in this Bid is complete, true, and accurate.
5. The Bidder understands and agrees to comply with the requirements of the Procurement Lobbying Law, State Finance Law § 139-j and § 139-k, and with OGS's procedures relating to permissible contacts during a procurement as required by State Finance Law § 139-j(3) and § 139-j(6)(b). Such requirements and procedures are posted at [http://ogs.ny.gov/aboutOgs/regulations/defaultSFL\\_139j-k.asp](http://ogs.ny.gov/aboutOgs/regulations/defaultSFL_139j-k.asp).

The signer affirms under penalties of perjury that he or she is duly authorized to legally bind the Bidder referenced above and that he or she signed this Bidder Certification as the legally binding act of the Bidder.

\_\_\_\_\_  
Print Full Bidder Entity Name

By:

\_\_\_\_\_  
Signature of Person Authorized to  
Legally Bind the Bidder

\_\_\_\_\_  
Print Name of Signatory

\_\_\_\_\_  
Print Title of Signatory

\_\_\_\_\_  
Date

**RETURN THIS PAGE AS PART OF BID**

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**ATTACHMENTS**

- Attachment 1 – Bidder Response Forms Part I – Technical Submittal
- Attachment 2 – Bidder Respnsse Forms Part II – Financial Submittal (Discount Tables)
- Attachment 3 – Inquiries Template
- Attachment 4 – Revised Bidder Submittal Checklist
- Attachment 5 – Revised General Questions and Contact Information
- Attachment 6 – New York State Required Certifications
- Attachment 7 – Encouraging Use of NYS Businesses
- Attachment 8 – Use of Service-Disabled Veteran-Owned Business Enterprises in Contract Performance
- Attachment 9 – Contractor’s Insurance Requirements
- Attachment 10 – Report of Contract Usage

**IMPORTANT NOTICE TO POTENTIAL BIDDERS:**

Receipt of these bid documents does not indicate that the Office of General Services has pre-determined your company's qualifications to receive a Contract award. Such determination will be made after the bid opening and will be based on our evaluation of your bid submission compared to the specific requirements and qualifications contained in these bid documents.

## SECTION I. OVERVIEW

### I.1 SCOPE AND OBJECTIVES

The scope of this Request for Proposals (RFP), issued by the Office of General Services (OGS), is to provide New York State Authorized Users with Fuel Card Services (as defined herein) from a qualified provider, that can be utilized at all or almost all commercial Fuel Locations (as defined in Section II.2) located throughout New York State and nationwide, as well as at NY State-Owned and Contract User-Owned Fuel Locations located within NY State, for conventional and alternative fuels supplied by multiple oil companies (e.g., Exxon Mobil, Chevron, Gulf, Shell, et al), and limited associated products (as defined herein) necessary for the safe operation of State vehicles. This RFP does not constitute an offer. OGS may, at its sole discretion, award a contract as a result of this Solicitation.

The objectives of the Fuel Card Services program are to:

- Provide improved customer service and convenience in the procurement of conventional and alternative fuels;
- Strengthen fuel purchase accountability;
- Provide Authorized Users with easily accessible reporting and fuel management options;
- Have Contractor provide deduction of all applicable federal, state and local government taxes from Fuel Card purchases prior to invoicing/billing Authorized Users, as appropriate;
- Support the diverse needs of the State vehicle fleet; and
- Improve operational efficiencies.

The State seeks a Fuel Card Services program that provides the following features, as defined and identified herein:

- A nationally recognized Fuel Card for purchasing fuel and limited associated products;
- A discount off the price of Fuel, for all Authorized Users, when purchased with the Contractor's Fuel Card;
- The ability to track the volume of fuel transactions obtained by contract users;
  - at commercial locations through reports
  - and at State owned and operated fueling stations. However, the bidders card is expected to interface with the State or Contract User's equipment allowing them to track the volume of fuel transactions obtained by contract users;
- Deduction of all applicable federal, state and local government taxes, due to the government's tax-exempt status, from Fuel Card purchases prior to invoicing/billing Authorized User, as specified in Section VI.2C, *Tax Deduction*;
- Authorized User Fuel Card usage options, as specified in Section VI.2B, *Fuel Card Services and Authorized User Options*; and
- Detailed reporting capabilities as specified in Section VI.2D, *Reporting*

### I.2 CONTRACT TERM

The Contract term shall be from June 22, 2018 or the date of all necessary approvals (the later of the two) until June 21, 2021. The Contract(s) resulting from this IFB shall commence after all necessary approvals and shall become effective upon mailing of the final executed Contracts by OGS (see Appendix B, §22 *Contract Creation/Execution*). The Contract will be in effect for three (3) years with an option to renew for up to two (2) additional one (1) year terms. The State may further extend this Contract for up to one (1) additional year or until a new contract is entered into, upon mutual written consent of the State and the Contractor in accordance with the Appendix B §23 *Contract Term - Extension*. Authorized User may engage the Contractor for services pursuant to this Contract at any time during the term of the Contract.

If at any time the Contract is canceled, terminated or expires, the Contractor has the affirmative obligation to extend appropriate and reasonable cooperation to assure the orderly transition of Contract services to the subsequent contractor.

Although the anticipated contract start date is June 22, 2018, in the event that a new vendor is awarded the contract resulting from this RFP, that vendor will need to begin setting up accounts/profiles, training fleet managers, transitioning

PIN numbers, distributing Fuel-cards, and testing in-house systems functionality prior to the contract start date to ensure that the new system is fully functional prior to that date.

### **I.3 CONFLICT OF TERMS AND CONDITIONS**

Conflicts among the documents in the RFP shall be resolved in the following Order of Precedence:

1. Appendix A, Standard Clauses for New York State Contracts;
2. The Invitation for Bids;
3. Appendix B, General Specifications;
4. Other Appendices and Attachments as deemed necessary

### **I.4 ELIGIBLE PARTICIPANTS**

Any Contract resulting from this RFP will be available for use by all Authorized Users (as defined by State Finance Law) of NYS Centralized Contracts (See also Appendix B, §2, *Definitions*, and §25, *Participation in Centralized Contracts*), and may be extended with the approval of the Contractor and the Commissioner for joint purchasing by any department, agency or instrumentality of the United States government and/or any state including political subdivisions thereof (“other authorized entities”).

### **I.5 ESTIMATED QUANTITIES**

A Contract resulting from this Solicitation shall be an estimated quantity Contract. No specific quantities are represented or guaranteed and the State provides no guarantee of individual Authorized User participation. The Contractor must furnish all quantities actually ordered at or below the Contract prices. The anticipated dollar value of the award for this Solicitation, based on historical purchases under previous awards, is approximately \$47,000,000 annually (equal to approximately 20,120,162 gallons of fuel purchased), with approximately 1,431,971 transactions. See Appendix B §25, *Participation in Centralized Contracts* and §28, *Estimated/Specific Quantity Contracts*.

Numerous factors could cause the actual quantities of Products purchased under a Contract resulting from this Solicitation to vary substantially from the estimates in the Solicitation. Such factors include, but are not limited to, the following:

- Such Contracts may be non-exclusive Contracts.
- There is no guarantee of quantities to be purchased, nor is there any guarantee that demand will continue in any manner consistent with previous purchases.
- The individual value of each Contract is indeterminate and will depend upon actual Authorized User demand and actual quantities ordered during the contract period.
- The State reserves the right to terminate any Contract for cause or convenience prior to the end of the term pursuant to the terms and conditions of the Contract.
- Contract pricing that is lower than anticipated could result in a higher quantity of purchases by Authorized Users than anticipated.
- Contract pricing that is higher than anticipated could result in a lower quantity of purchases by Authorized Users than anticipated.

By submitting a Proposal, Bidder acknowledges the foregoing and agrees that actual good faith purchasing volumes during the term of the resulting Contracts could vary substantially from the estimates provided in this Solicitation.

### **I.6 KEY EVENTS AND DATES**

This RFP outlines the terms and conditions and all applicable information required for submitting a Bid. The Bidder should pay strict attention to the Bid submission date and time to prevent disqualification. To ensure compliance with Bid requirements, the Bidder should follow the format and content instructions in the RFP, Section IX, *Proposal Format and Content*.

<b>EVENT</b>	<b>DATE</b>	<b>TIME</b>
RFP Release	7/6/2017	N/A
Final Date for Vendor Inquiries	7/20/2017	5:00 PM ET
OGS response to Vendor Inquiries (estimated)	7/28/2017	N/A
Submission of Proposal/Bid Opening	8/8/2017	11:00 AM ET
Bidder tentative award notification (estimated)	10/10/2017	N/A
Contract negotiations completion (estimated)	11/22/2017	N/A
Contract Notification (estimated)	12/15/2017	N/A

## I.7 VENDOR INQUIRIES

All questions regarding this Solicitation should be submitted using Attachment 3 – *Inquiries Template*, citing the applicable Solicitation document name and document section. The completed form must be emailed to **OGS.sm.PS\_CM\_FleetFuelRoads@ogs.ny.gov** by the date and time indicated in the *Key Events and Dates* section. Questions submitted after the deadline indicated may not be answered. A Bidder is strongly encouraged to submit questions as soon as possible. Answers to all questions of a substantive nature will be provided to all prospective Bidders in the form of a question and answer document which will be posted to the OGS website and will not identify the Bidder asking the question. Notification of this posting will be advertised in the NYS Contract Reporter.

If Bidder intends to submit a Proposal that deviates from the requirements of the Solicitation in any way, the proposed deviations should be submitted during the Vendor Inquiries period so that they may be given due consideration prior to the submission of Proposals. See Section IV.3, *Bid Deviations* for additional information.

## SECTION II. GENERAL TERMS

Proposals from all Bidders shall include all of Bidder's administrative, technical, and financial qualifications, as detailed in accordance with Section IX, *Proposal Format and Content*.

Appendix A, *Standard Clauses for New York State Contracts*, is attached hereto and is made a part of this proposal.

### II.1 MANDATORY REQUIREMENTS

A Bidder submitting a response to this RFP is required **at a minimum** to have:

- A. Four (4) years experience providing Fuel Card Services;
- B. Statewide (covers all New York State counties) and nationwide Fuel Locations, supported by a Fuel Card that may be used for Fuel supplied by multiple oil companies (e.g., Exxon Mobil, Chevron, Gulf and Shell), and limited Associated Products. See Section VI.2A, *Fuel Location Network*;
- C. Discount Program: The State of New York is seeking the greatest Fuel discount available to ensure lowest net cost to Authorized Users. The Bidder shall provide a tiered discount structure, as indicated in Attachment - *Part II -- Financial Submittal (Discount Tables)*. The Contractor shall apply the discount as specified in Section V.3, *Fuel and Associated Product Discount(s)*;
- D. The ability to provide Authorized User Fuel Card fleet management controls, as specified in Section VI.2B, *Fuel Card Services and Authorized User Options*;
- E. The ability to deduct all applicable federal, state and local government taxes, due to the government's tax-exempt status, from the Fuel Card bills prior to invoicing/billing Authorized User, as specified in Section VI.2C, *Tax Deduction*;
- F. The ability to provide detailed Fuel Card usage reports, as specified in Section VI.2D, *Reporting*;
- G. The ability to provide any necessary training for use of the Fuel Card, and customer services to aid in use of the Fuel Card by Authorized Users, as specified in Section VI.2E, *Training and Help Desk Services*;

- H. The ability to issue to each Authorized User, on a monthly basis, a Central Bill (as defined herein), that details the NYS discount and applicable taxes that have been deducted. Invoices shall be accompanied by a report that details the transactions that have occurred during the invoiced billing cycle. See Section VI.2F, *Invoicing*;
- I. The ability to provide Fuel Card security and confidentiality, as specified in Section VI.2G, *Security and Confidentiality*;
- J. The ability to implement the Fuel Card Services program in accordance with Section VI.2H, *Implementation Plans*;
- K. The ability to use the Bidder's Fuel Card as a means to authorize transactions at State-Owned or Contract User-Owned Independent Fuel Stations in accordance with Section VI.2I, *Integration of Bidder's Fuel Card with Contract Users Independent Fuel Stations, Including Existing State-Owned Facilities*;
- L. No Fuel Card fees, (e.g., annual fees, fees for issuance, renewals and cancellation, or fees for Authorized User option changes), assessed to or collected from Authorized Users. A Bidder who submits a proposal containing Fuel Card fees for Authorized Users may be rejected. *Note: The State's Prompt Payment Law prescribes the manner in which the State compensates a Contractor for late payment from New York State Agencies. Interest that accrues as a result of statutory compensation shall not be considered a fee*

## II.2 DEFINITION OF TERMS

Terms used in this document that are capitalized shall be defined in accordance with Appendix B, (§2 *Definitions*), of this RFP, which is hereby incorporated by reference. In addition to the terms defined in Appendix B, the following defined terms shall also apply:

- A. **ACTIVE/INACTIVE CARD(S) A FUEL CARD** as defined below that is authorized to make **FUEL** purchases and has been used or not used within a specific period of time as defined by the selected contractor.
- B. **ASSOCIATED PRODUCT** A non-Fuel Product that may be purchased with the Fuel Card ONLY in an Emergency situation. Associated Products are limited to Products that are required only for the continued safe operation of the vehicle (e.g fluid refills {motor oil, transmission fluid, power steering fluid, brake fluid, antifreeze/coolant, windshield washer fluid, etc.}, windshield wipers, head lights). Car washes will not be considered an Associated Product for this Solicitation and the resultant contract.
- C. **CARDHOLDER** The Authorized User to which a Fuel Card has been assigned. The Authorized User may allocate Fuel Cards to an individual, vehicle and/or department.
- D. **CENTRAL BILL/CENTRAL PAY** The process under which each Authorized User is assigned a single Fuel Card account for all cards issued to such Authorized User, and receives a single monthly invoice for all activity charged against or credited to such account. Notwithstanding the foregoing, a separate account and invoice may be allowed, if required to implement a fictitious name account or sub-account, as described in Section VI.2B(9).
- E. **DUAL USE FUEL CARD(S) A FUEL CARD** as defined below, with added functionality allowing for the authorization of transactions at non-commercial, State-Owned or Authorized User-Owned **INDEPENDENT FUEL STATIONS**
- F. **FUEL CARD SERVICES** Services related to the use of a Fuel Card, including, but not limited to, the ability to purchase Fuel and limited Associated Products from Fuel Locations, applicable tax deduction, customized pricing and billing, usage reporting and card security.
- G. **FUEL** A consumable material or substance used to produce energy for powering vehicles and small engines (e.g., automobiles, trucks, heavy and light duty equipment). Included in this definition are conventional fuels (e.g., gasoline and diesel) and alternative fuels (e.g., hydrogen, propane, compressed natural gas (CNG), liquefied natural gas (LNG), methanol, ethanol and electricity). *Note: A Bidder shall not be required to provide Fuel Locations that supply all Fuel types identified herein. However, at a minimum, Bidder must provide Fuel Locations in all New York State counties that supply conventional Fuels.*
- H. **FUEL CARD(S)** A Contractor-issued electronic payment card for use by an Authorized User to purchase Fuel and limited Associated Products at Fuel Locations. The card shall be accepted at Fuel Locations located throughout New York State, and nationwide, for Fuel supplied by multiple oil companies (e.g., Exxon Mobil, Chevron, Gulf and Shell). (See also **DUAL USE FUEL CARD(S)**)
- I. **FUEL LOCATION(S)** Fuel stations or outlets, including retail, commercial, and independent locations, where an Authorized User may use the Fuel Card to purchase Fuel and limited Associated Products at retail or commercial



outlets, or be authorized to make Fuel transactions at **INDEPENDENT FUEL STATIONS**. *Note: It is not required that all Fuel types be offered at all Fuel Locations.* (See also **INDEPENDENT FUEL STATION(S)**)

- J. **INDEPENDENT FUEL STATION(S)** A non-commercial **FUEL LOCATION** owned and operated by either the State of New York or any other Authorized User. **FUEL CARDS** may be coded to allow transactions at these facilities.
- K. **MAY** The permissive in a contract clause or specification. “May” does not mean “required.” Also see “Shall” and “Must.”
- L. **MUST** The imperative in a contract clause or specification. “Must” is synonymous with “required.” Also see “Shall” and “May.”
- M. **PERSONAL IDENTIFICATION NUMBER (PIN)** A numeric identification code used for security purposes to identify Fuel Card Authorized Users when making transactions.
- N. **PRIMARY FUEL DISCOUNT(S)** The NYS discount(s) that an Authorized User of the Fuel Card will receive for Fuel purchases at all of the Bidder’s Fuel Locations.
- O. **PROCUREMENT SERVICES** A division of the New York State Office of General Services which is authorized by law to issue centralized, statewide contracts for use by New York agencies, political subdivisions, schools, libraries and others authorized by law to participate in such contracts.
- P. **SHALL** The imperative in a contract clause or specification. “Shall” is synonymous with “required.” Also see “Must” and “May.”
- Q. **TOTAL CARDS** Refers to the total amount of all **FUEL CARDS** that are activated and available to make purchases. This number does not include cards that have been deactivated, lost, stolen, or otherwise taken out of circulation.

### SECTION III. GENERAL REQUIREMENTS

This section sets forth general requirements that apply to this Solicitation and the resulting Contract.

#### III.1 NEW YORK STATE VENDOR FILE REGISTRATION:

Prior to being awarded a Contract pursuant to this Solicitation, the Bidder and any authorized resellers who accept payment directly from the State, must be registered in the New York State Vendor File (Vendor File) administered by the Office of the State Comptroller (OSC). This is a central registry for all vendors who do business with New York State Agencies and the registration must be initiated by a State Agency. Following the initial registration, a unique New York State ten-digit vendor identification number (Vendor ID) will be assigned to your company and to each of your authorized resellers (if any) for use on all future transactions with New York State. Additionally, the Vendor File enables a vendor to use the Vendor Self-Service application to manage all vendor information in one central location for all transactions related to the State of New York.

If Bidder is already registered in the New York State Vendor File, the Bidder must enter its Vendor ID on the first page of this Solicitation. Authorized resellers already registered should list the Vendor ID number along with the authorized reseller information.

If the Bidder is not currently registered in the Vendor File, the Bidder must request assignment of a Vendor ID from OGS. Bidder must complete the OSC Substitute W-9 Form ([http://www.osc.state.ny.us/vendors/forms/ac3237s\\_fe.pdf](http://www.osc.state.ny.us/vendors/forms/ac3237s_fe.pdf)) and submit the form to OGS in advance of Bid submission. Please send this document to the Designated Contact identified in the Solicitation. In addition, if an authorized reseller is to be used that does not have a Vendor ID, an OSC Substitute W-9 form should be completed by each authorized reseller and submitted to OGS. OGS will initiate the vendor registration process for all Bidders and authorized resellers. Once the process is initiated, registrants will receive an e-mail identifying their Vendor ID and instructions on how to enroll in the online Vendor Self-Service application.

For more information on the Vendor File please visit the following website:  
[http://www.osc.state.ny.us/vendor\\_management](http://www.osc.state.ny.us/vendor_management).

#### III.2 NEW YORK STATE VENDOR RESPONSIBILITY

OGS conducts a review of prospective Contractors (“Bidders”) to provide reasonable assurances that the Bidder is responsive and responsible. A For-Profit Business Entity Questionnaire (hereinafter “Questionnaire”) is used for non-

construction Contracts and is designed to provide information to assess a Bidder's responsibility to conduct business in New York based upon financial and organizational capacity, legal authority, business integrity, and past performance history. By submitting a Bid, Bidder agrees to fully and accurately complete the Questionnaire. The Bidder acknowledges that the State's execution of the Contract will be contingent upon the State's determination that the Bidder is responsible, and that the State will be relying upon the Bidder's responses to the Questionnaire, in addition to all other information the State may obtain from other sources, when making its responsibility determination.

OGS recommends each Bidder file the required Questionnaire online via the New York State VendRep System. To enroll in and use the VendRep System, please refer to the VendRep System Instructions and User Support for Vendors available at the Office of the State Comptroller's (OSC) website at [http://www.osc.state.ny.us/vendrep/info\\_vrsystem.htm](http://www.osc.state.ny.us/vendrep/info_vrsystem.htm) or to enroll, go directly to the VendRep System online at <https://portal.osc.state.ny.us>.

Vendors must provide their New York State Vendor Identification Number when enrolling. For information on how to request assignment of a Vendor ID, see the *NYS Vendor File Registration* section. OSC provides direct support for the VendRep System through user assistance, documents, online help, and a help desk. The OSC Help Desk contact information is located at <http://www.osc.state.ny.us/portal/contactbuss.htm>. Bidders opting to complete and submit the paper questionnaire can access this form and associated definitions via the OSC website at [http://www.osc.state.ny.us/vendrep/forms\\_vendor.htm](http://www.osc.state.ny.us/vendrep/forms_vendor.htm).

In order to assist the State in determining the responsibility of the Bidder prior to Contract award, the Bidder must complete and certify (or recertify) the Questionnaire no more than six (6) months prior to the Bid due date. A Bidder's Questionnaire cannot be viewed by OGS until the Bidder has certified the Questionnaire. It is recommended that all Bidders become familiar with all of the requirements of the Questionnaire in advance of the Bid opening to provide sufficient time to complete the Questionnaire.

The Bidder agrees that if it is awarded a Contract the following shall apply:

The Contractor shall at all times during the Contract term remain responsible. The Contractor agrees, if requested by the Commissioner of OGS, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

The Commissioner of OGS, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner of OGS issues a written notice authorizing a resumption of performance under the Contract.

The Contractor agrees that if it is found by the State that Contractor's responses to the Questionnaire were intentionally false or intentionally incomplete, on such finding, the Commissioner may terminate the Contract.

Upon written notice to the Contractor, and a reasonable opportunity to be heard with appropriate OGS officials or staff, the Contract may be terminated by the Commissioner of OGS at the Contractor's expense where the Contractor is determined by the Commissioner of OGS to be non-responsible. In such event, the Commissioner of OGS may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

In no case shall such termination of the Contract by the State be deemed a breach thereof, nor shall the State be liable for any damages for lost profits or otherwise, which may be sustained by the Contractor as a result of such termination.

### **III.3 TAX LAW §5-A**

Tax Law § 5-a requires certain Contractors awarded State Contracts for commodities, services and technology valued at more than \$100,000 to certify to NYS Department of Taxation and Finance (DTF) that they are registered to collect New York State and local sales and compensating use taxes. The law applies to Contracts where the total amount of such Contractors' sales delivered into New York State is in excess of \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made, and with respect to any affiliates and Subcontractors whose sales delivered into New York State exceeded \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made.

A Contractor is required to file the completed and notarized Form ST-220-CA with the Bid to OGS certifying that the Contractor filed the ST-220-TD with DTF. Only the Form ST-220-CA is required to be filed with OGS. The ST-220-CA can be found at [http://www.tax.ny.gov/pdf/current\\_forms/st/st220ca\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220ca_fill_in.pdf). The ST-220-TD can be found at [http://www.tax.ny.gov/pdf/current\\_forms/st/st220td\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220td_fill_in.pdf). Contractor should complete and return the certification forms within five (5) business days of request (if the forms are not completed and returned with Bid submission). Failure to make either of these filings may render a Contractor non-responsive and non-responsible. Contractor shall take the necessary steps to provide properly certified forms within a timely manner to ensure compliance with the law. The ST-220-TD only needs to be filed once with DTF, unless the information changes for the Contractor, its affiliates, or its Subcontractors.

Vendors may call DTF at 518-485-2889 with questions or visit the DTF web site at <http://www.tax.ny.gov/> for additional information.

### **III.4 INFORMATION SECURITY BREACH AND NOTIFICATION ACT**

Section 208 of the State Technology Law (STL) and Section 899-aa of the General Business Law (GBL) require that State entities and persons or businesses conducting business in New York who own or license computerized data which includes private information including an individual's unencrypted personal information plus one or more of the following: social security number, driver's license number or non-driver ID, account number, credit or debit card number plus security code, access code or password which permits access to an individual's financial account, must disclose to a New York resident when their private information was, or is reasonably believed to have been, acquired by a person without valid authorization. Disclosure of breach of that private information to all individuals affected or potentially affected must occur in the most expedient time possible without unreasonable delay, after necessary measures to determine the scope of the breach and to restore integrity, but with delay if law enforcement determines it impedes a criminal investigation. When notification is necessary, the State entity or person or business conducting business in New York must also notify the following New York State agencies: the Attorney General, the Office of Cyber Security & Critical Infrastructure Coordination (CSCIC) and the Consumer Protection Board (CPB). Information relative to the law and the notification process is available at: <http://www.cscic.state.ny.us/security/securitybreach/>

### **III.5 SUMMARY OF POLICY AND PROHIBITIONS ON PROCUREMENT LOBBYING LAW**

Pursuant to State Finance Law §139-j and §139-k, this Solicitation includes and imposes certain restrictions on communications between OGS and a Bidder during the procurement process. A Bidder is restricted from making contacts from the earliest posting, on a governmental entity's website, in a newspaper of general circulation, or in the procurement opportunities newsletter of intent to solicit offers/Bids through final award and approval of the Procurement Contract by OGS and, if applicable, the Office of the State Comptroller ("restricted period") to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law §139-j(3)(a). Designated staff, as of the date hereof, is identified on the first page of this Solicitation and in the *MWBE Designated Contacts* and *Insurance Designated Contacts* sections. OGS employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the Bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for Contract award and, in the event of two findings within a four-year period, the Bidder is debarred from obtaining governmental Procurement Contracts for four years. Further information about these requirements can be found on the OGS website at: <http://www.ogs.ny.gov/acpl/>

### **III.6 CONTRACTOR REQUIREMENTS AND PROCEDURES FOR PARTICIPATION BY NEW YORK STATE CERTIFIED MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN**

#### **I. New York State Law**

Pursuant to New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the New York Codes, Rules and Regulations ("NYCRR"), the New York State Office of General Services ("OGS") is required to promote opportunities for the maximum feasible participation of New York State-certified Minority- and Women-Owned Business Enterprises ("MWBEs") and the employment of minority group members and women in the performance of OGS contracts.

#### **II. General Provisions**

- A. OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 ("MWBE Regulations") for all State contracts as defined therein, with a value (1) in excess of \$25,000

for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.

- B. The Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to OGS, to fully comply and cooperate with OGS in the implementation of New York State Executive Law Article 15-A and the regulations promulgated thereunder. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for MWBEs. Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, State, or local laws.
- C. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, a finding of non-responsibility, breach of contract, withholding of funds, suspension or termination of the Contract, and/or such other actions or enforcement proceedings as allowed by the Contract and applicable law.

### III. Equal Employment Opportunity (EEO)

- A. The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to all Contractors, and any subcontractors, awarded a subcontract over \$25,000 for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials, or any combination of the foregoing, to be performed for, or rendered or furnished to, the contracting State agency (the “Work”) except where the Work is for the beneficial use of the Contractor.
  - 1. Contractor and subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) the performance of work or the provision of services or any other activity that is unrelated, separate, or distinct from the Contract; or (ii) employment outside New York State.
  - 2. By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor’s equal employment opportunity policy. In addition, Contractor agrees to comply with the Non-Discrimination Requirements set forth in clause 5 of Appendix A.
- B. Form EEO 100 – Staffing Plan  
To ensure compliance with this section, the Contractor agrees to submit, or has submitted with the Bid, a staffing plan on Form EEO 100 to OGS to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and federal occupational categories.
- C. Form EEO - 101 - Workforce Utilization Reporting Form (Commodities and Services) (“Form EEO-101-Commodities and Services”)
  - 1. The Contractor shall submit, and shall require each of its subcontractors to submit, a Form EEO-101-Commodities and Services to OGS to report the actual workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The Form EEO-101-Commodities and Services must be submitted electronically to OGS at [EEO\\_CentCon@ogs.ny.gov](mailto:EEO_CentCon@ogs.ny.gov) on a quarterly basis during the term of the Contract by the 10th day of April, July, October, and January.
  - 2. Separate forms shall be completed by Contractor and all subcontractors.
  - 3. In limited instances, the Contractor or subcontractor may not be able to separate out the workforce utilized in the performance of the Contract from its total workforce. When a separation can be made, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided relates to the actual workforce utilized on the Contract. When the workforce to be utilized on the Contract cannot be separated out from the Contractor’s or subcontractor’s total workforce, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided is the Contractor’s or subcontractor’s total workforce during the subject time frame, not limited to work specifically performed under the Contract.

- D. Contractor shall comply with the provisions of the Human Rights Law and all other State and federal statutory and constitutional non-discrimination provisions. Contractor and subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status, or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal and conviction and prior arrest.

#### **IV. Contract Goals**

- A. For purposes of this procurement, OGS conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set goals for participation by MWBEs as subcontractors, service providers, or suppliers to Contractor. Contractor is, however, encouraged to make every good faith effort to promote and assist the participation of MWBEs on this Contract for the provision of services and materials. The directory of New York State Certified MWBEs can be viewed at: <https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528>. Additionally, following Contract execution, Contractor is encouraged to contact the Division of Minority and Women's Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

B. Good Faith Efforts

Pursuant to 5 NYCRR §142.8, evidence of good faith efforts shall include, but not be limited to, the following:

1. A list of the general circulation, trade, and MWBE-oriented publications and dates of publications in which the Contractor solicited the participation of certified MWBEs as subcontractors/suppliers, copies of such solicitations, and any responses thereto.
2. A list of the certified MWBEs appearing in the Empire State Development ("ESD") MWBE directory that were solicited for this Contract. Provide proof of dates or copies of the solicitations and copies of the responses made by the certified MWBEs. Describe specific reasons that responding certified MWBEs were not selected.
3. Descriptions of the Contract documents/plans/specifications made available to certified MWBEs by the Contractor when soliciting their participation and steps taken to structure the scope of work for the purpose of subcontracting with, or obtaining supplies from, certified MWBEs.
4. A description of the negotiations between the Contractor and certified MWBEs for the purposes of complying with the MWBE goals of this Contract.
5. Dates of any pre-bid, pre-award, or other meetings attended by Contractor, if any, scheduled by OGS with certified MWBEs whom OGS determined were capable of fulfilling the MWBE goals set in the Contract.
6. Other information deemed relevant to the request.

#### **V. Fraud**

Any suspicion of fraud, waste, or abuse involving the contracting or certification of MWBEs shall be immediately reported to ESD's Division of Minority and Women's Business Development at (855) 373-4692.

**ALL FORMS ARE AVAILABLE AT:** <http://www.ogs.ny.gov/MWBE/Forms.asp>

## **SECTION IV. BID ADMINISTRATION**

### **IV.1 PERFORMANCE AND BID BONDS**

There are no bonds for this Contract. The Commissioner of OGS has determined that no performance, payment or Bid bond, or negotiable irrevocable letter of credit or other form of security for the faithful performance of the Contract is required at any time during the term of the resulting Contract.

### **IV.2 NOTIFICATION OF AWARD**

Tentative award of the Contract shall consist of written notice to that effect by OGS to a selected Bidder, who shall execute a Contract upon a determination by OGS that the Bidder is responsive and responsible.

Non-awardees will also be notified that their Bid was not selected for award.



### IV.3 BID DEVIATIONS

Bids must conform to the terms set forth in this Solicitation. As set forth in Bidder Questions, if Bidder intends to submit a Bid that deviates from the requirements of the Solicitation in any way, the proposed deviations should be submitted during the Questions period so that they may be given due consideration prior to the submission of Bids. Material deviations (including additional, inconsistent, conflicting, or alternative terms) submitted with the Bid may render the Bid non-responsive and may result in rejection of the Bid.

Bidder is advised that OGS will not entertain any exceptions to Appendix A (*Standard Clauses for New York State Contracts*). OGS will also not entertain exceptions to the Solicitation or Appendix B (*General Specifications*) that are of a material and substantive nature.

Extraneous terms submitted on standard, pre-printed forms (including but not limited to: product literature, order forms, license agreements, contracts or other documents) that are attached or referenced with submissions shall not be considered part of the Bid or resulting Contract, but shall be deemed included for informational or promotional purposes only.

## SECTION V. CONTRACT ADMINISTRATION

### V.1 CONTRACTOR'S ABILITY TO CONDUCT CREDIT EVALUATIONS

#### A. State Agency

1. The successful Bidder is precluded from conducting credit evaluations for State Agencies. State Agency procurements are covered under the NY State Finance Prompt Payment Law. Invoices for State Agencies are primarily processed through the Business Services Center and paid through the Office of the State Comptroller. State Agencies do not have individual credit.

#### B. Non-State Agency (see <http://www.ogs.ny.gov/purchase/snt/othersuse.asp> for listing of eligible entities)

1. The successful Bidder may conduct credit evaluations for Non-State Agencies intending to use the Contract and deny services to Non-State Agencies that do not meet the Bidder's standard commercial risk qualifications. The successful Bidder shall notify the Non-State Agency in writing that their use of the Contract has been denied based on an unsatisfactory credit rating.

### V.2 PROCUREMENT INSTRUCTIONS

- A. An Authorized User will review the Fuel discount and Fuel Card Services listed on the Contract Award Notification (CAN), which is the award document prepared by OGS to notify Authorized Users of a Contract award. OGS reserves the right to add additional procurement instructions in the CAN, in addition to the general instructions contained in this RFP.
- B. An Authorized User shall seek to engage the services of the Contractor by submitting a request to the Contractor by means of the contact information provided in **Attachment 5 – Revised General Questions and Contact Information**, or other acceptable means established between the Contractor and OGS. At a minimum, the request shall consist of:
  1. Contract number;
  2. Authorized User name and contact information;
  3. Number of Fuel Cards required;
  4. Custom embossing requirements;
  5. Delivery specifications;
  6. A description of the Fuel Card Authorized User options that will be required for the Fuel Cards (see Section VI.2B, *Fuel Card Services and Authorized User Options*; and
  7. Submission of NYS form FT-505.1, *Government Entity Credit Card Refund or Credit Election*, for certification of tax exempt status. *Note: The Contractor must counter-sign form FT-505.1 and submit it to the NYS Department of Taxation and Finance before taxes can be deducted.*
- C. An Authorized User reserves the right to secure through separate procurement methods all or part of the Fuel Card Services from any other contract sources.

**V.3 FUEL AND ASSOCIATED PRODUCT DISCOUNT(S)**

The Contractor shall provide a Primary Fuel Discount at all Fuel Locations where the Authorized User may use the Fuel Card, and may also offer Associated Product Discount(s), as indicated in Attachment 2 - *Bidder Response Forms Part II -- Financial Submittal (Discount Tables)*, to all Authorized Users. Discounts shall be calculated and applied as follows:

**A. Fuel Discount(s):**

The Primary NYS Fuel Discount shall be calculated based on the aggregate volume of all Authorized User Fuel Card purchases under the Contract, for Fuel purchases at Fuel Locations. Tiered discounts shall be calculated monthly, based on the aggregate volume of all Authorized User Fuel transactions made during the applicable billing cycle at the time of invoicing, and be applied to the monthly Central Bill for the applicable billing cycle. In order to allow for the aggregation of the NYS discount, all Authorized Users of the Contract shall be invoiced on the same billing cycle. The NYS Fuel Discount shall be applied, prior to deduction of the applicable tax(es), to the gross monthly sales amount of each Authorized User's Fuel purchases at all Fuel Locations.

**B. Associated Product Discount(s):**

The NYS Associated Product discount(s), if applicable, shall be applied to an Authorized User's monthly Central Bill for the applicable billing cycle. If Contractor deducts applicable tax(es) for Associated Products, the NYS discount shall be applied prior to deduction of the tax(es).

**V.4 UPDATING CONTRACTOR DISCOUNT(S)**

The Fuel discount(s) set forth in Attachment 2: Bidder Response Forms Part II -- *Financial Submittal (Discount Tables)*, shall not decrease during the Contract term. Contractor may increase the Contract discount offered at any time, without prior approval by OGS, provided that OGS be notified at the time of the increase in discount.

Associated Product Discount(s), if available, shall not decrease without the prior approval of OGS. In order to request a decrease in discount, a Contractor shall submit a notarized request to OGS on company letterhead. Such request shall include a justification for the discount change. If approved, OGS staff will notify Contractor in writing. Discount decreases shall not be effective until approval by OGS. Contractor may increase the Contract discount offered at any time, without prior approval by OGS, provided that OGS be notified at the time of the increase in discount.

**SECTION VI. BIDDER TECHNICAL QUALIFICATIONS & SERVICE REQUIREMENTS****VI.1 BIDDER QUALIFICATIONS**

Bidder is advised that the State's intent in having the requirements listed below is to ensure that only qualified and reliable Contractors perform the work of the resulting Contract. Bidder shall have the burden of demonstrating to the satisfaction of Procurement Services that it can perform the work required. Procurement Services retains the right to request any additional information pertaining to the Bidder's ability, qualifications, financial capacity, financial stability, and procedures used to accomplish all work under the resulting Contract as it deems necessary to ensure safe and satisfactory work. A Bidder shall meet the following qualifications:

**A. Experience (Mandatory)**

The Bidder must demonstrate its qualifications to meet the requirements of this RFP, including identification of key Bidder personnel and their relevant expertise, the Bidder's experience with contracts of this magnitude and scope, financial ability to handle the volume and revenue anticipated under the Contract, (as specified in Attachment 2 – *Bidder Response Forms Part II - Financial Submittal*), and its integrity and reliability. In their response the Bidder shall provide the following:

**1. Executive Summary**

The Bidder shall provide an executive summary including profiles of its operations and qualifications. These profiles shall outline the Bidder's operations and technical qualifications and experience relevant to the performance of the Contract. These profiles should include: locations (including but not limited to primary location, additional processing centers, backup sites, etc.), corporate and organizational structures using organizational charts, areas of expertise and overall experience with Fuel Card Services. The executive summary shall also include an overview, preferably including diagrams, to their approach to providing service requirements contained herein, highlighting the strengths and capabilities of the Bidder to provide such services.

**2. Relevant Work Experience**

The Bidder shall demonstrate a minimum of four (4) years experience providing Fuel Card Services. The proposal must list and describe the Bidder's relevant work experience in specific projects and contracts for

providing Fuel Card Services to large governmental entities (i.e., federal or state governments or their subdivisions). Descriptions should include the size, scope and duration of each project, specifying the time period the work was performed. If the Bidder has no prior large governmental experience, the Bidder should furnish information for similarly sized large commercial entities, small governmental entities (i.e., local government or their subdivisions) or similarly sized small commercial entities.

**B. Qualifications & Additional Information (Desirable)**

The Bidder should note other qualifications or additional information that it believes would be of importance to the State in determining that the Bidder is qualified. All statements made must be independently verifiable by the State.

## **VI.2 SERVICE REQUIREMENTS**

The Bidder must provide a detailed narrative response, which fully discusses and describes the manner in which it meets or exceeds the following service requirements for Fuel Card Services. The Bidder's response must specifically address the unique needs of the State. **Additional fees and charges for all transactions are not allowable under the terms and conditions of this solicitation.**

**A. Fuel Location Network (Mandatory)**

The Bidder must provide, for the life of the Contract, a network of Fuel Locations that allow Cardholders to fuel their vehicles with fuel supplied by multiple oil companies (e.g., Exxon Mobil, Chevron, Gulf and Shell), and to purchase Associated Products, in all counties in New York State, as well as at nationwide locations. A Bidder shall not be required to provide a Fuel Location in each county that supplies all Fuel types identified in Section II.2, *Definition of Terms*. However, at a minimum, Bidder must provide Fuel Locations that accept Bidder's Fuel Card and supply conventional Fuels in each New York State county. A Bidder is not required to provide Fuel Locations for non-conventional Fuels. Bidder shall maintain a searchable database of Fuel Locations that accept the Fuel Card on their company website.

Bidder shall submit a Microsoft Excel spreadsheet (2013 or later version) that lists all Fuel Locations that may be used with the Bidder's Fuel Card, for conventional Fuel purchases, in New York State. Each physical Fuel Location address shall be listed only once on the list. The Fuel Location list shall, at a minimum, include the following columns:

1. Station name (e.g., Sample Town Gas Station);
2. Address (e.g., 123 Sample St.);
3. City;
4. Zip Code;
5. County; and
6. Brand and type of conventional Fuel

**B. Fuel Card Services and Authorized User Options (Mandatory)**

The Bidder shall provide the following Fuel Card Services and options per the Authorized User's specifications. Bidder must provide a description of how the service will be provided and how the Authorized User may specify and update Fuel Card options (e.g., via phone, Bidder's website, and/or email).

1. Individual Fuel Cards shall be assignable by an Authorized User to a specific:
  - a) Individual, identified by name or Personal Identification Number;
  - b) Vehicle, identified by the Authorized User vehicle identification number (VIN) and/or vehicle license plate;
  - c) Authorized User agency, division or business unit; or
  - d) Any combination of a), b) and c).
2. The Authorized User shall have the ability to assign up to two (2) prompts to each Fuel Card, for Cardholder input at the fuel pump or other keypad provided at the Fuel Location, in order to track and authorize every Fuel and Associated Product purchase as well as limit the purchasing of items outside of the contract scope. The Authorized User may elect to assign no prompts, one (1) prompt, or two (2) prompts to each Fuel Card. Each prompt shall allow for up to six (6) digits to be entered. When assigning prompts, the User Agency's Fleet Manager shall have the ability to choose from the following options:
  - a) Individual Cardholder PIN;
  - b) Authorized User Agency vehicle number; and



- c) Odometer reading.
3. The ability to limit each Fuel Card purchase to:
  - a) Fuel only (i.e, Fuel Card shall not be authorized for Associated Product purchases);
  - b) Fuel Location;
  - c) Number of Fuel or Associated Products purchases or transactions per day, week or month;
  - d) Number of gallons of Fuel; or
  - e) Any combination of a), b), c) and d).
4. Fuel Cards shall be sorted, bundled and delivered according to an Authorized User's specifications (e.g., by Cardholder name, individual Fuel Card user name, and/or department location).
5. Fuel Cards shall be provided with custom embossing that includes up to three lines of data (e.g., Authorized User name and/or name of department(s) within such entity, vehicle number or Fuel Card user name).
6. Fuel Cards shall not expire during the initial Contract term or be cancelled by the Bidder for inactivity.
7. The ability to manage Fuel Card accounts at the Contractor's website, including, but not limited to:
  - a) Changes to Fuel Card user options;
  - b) PIN management;
  - c) Addition and deletion of individual Cardholder's, as allocated by the Authorized User;
  - d) Cancellation and replacement of Fuel Cards; and
  - e) The ability to set Fuel Card transactions report parameters (see also Section VI.2D(1), *Authorized User Transaction Reports and Inquiries*, below).
8. User Agency's Fleet Manager controls capability to include processes for:
  - a) Authorization of Fuel Cards, including card renewals;
  - b) Preventing inappropriate usage of Fuel Card by Cardholder (e.g., limit purchase to Fuel tank size, limit purchases of items out of scope of the contract);
  - c) Cancellation of Fuel Cards;
  - d) Cancellation of lost or stolen Fuel Cards;
  - e) Increase/decrease limits of Fuel Cards;
  - f) The level of Authorized User data embedded in the Fuel Card; and
  - g) The maintenance and security of Authorized User data.
9. Certain Authorized Users engaged in law enforcement or other investigative activities will require additional accounts or sub-accounts, in a fictitious name or names, where such cards are embossed with such fictitious name, and include generic or card issuer specific card backgrounds, where for such accounts:
  - a) No information is transmitted to any merchant, nor any information embossed, printed, appearing or encoded on a Fuel Card associates the card, card holder, driver, vehicle or account with the State of New York or its agencies to any person or entity other than the card issuer; and
  - b) The Bidder further agrees to keep confidential the true nature and identity of the Cardholder using such fictitious name, from any third parties, except as required by law, or with and to the extent of the express written permission of the Authorized User. See also Section VI.2D, *Reporting*.
10. Integration of the Bidder's Fuel Card Services with existing NYS fuel management system software, so that Authorized Users may use Contractor provided reports with existing resources.

**C. Tax Deduction (Mandatory)**

Bidder shall demonstrate its ability to deduct all applicable federal, state and local government taxes for Fuel purchases prior to invoicing the Authorized User. Reference "Federal Tax Law Excise Taxes (Including Fuel Tax Credits and Refunds)" Publication 510 (Rev. January 2016), available at <http://www.irs.gov/pub/irs-pdf/p510.pdf>.

The Authorized User Agency shall certify tax exempt status by completing NYS form FT-505.1, *Government Entity Credit Card Refund or Credit Election*. *Note: The Contractor must counter-sign form FT-505.1 and submit it to the NYS Department of Taxation and Finance before taxes can be deducted. The Contractor may claim a refund of the taxes that were paid by the Authorized User for the Fuel purchase by filing form FT-505, Claim for Refund of Taxes Paid on Government Entity Credit Card Purchases of Fuel, with the NYS Department of Taxation and Finance.*

Taxes that shall be deducted include, but are not limited to:

1. Federal Excise Tax;
2. New York State Excise Tax;
3. New York State Petroleum Business Tax;
4. New York State Sales Tax; and
5. Any local Sales Tax levied by a political subdivision of the State of New York.

**D. Reporting (Mandatory)**

Bidder shall demonstrate the ability to provide the following reports. The Bidder must describe its transaction reporting process, the types of reports it can provide, and the manner in which an Authorized User may specify report criteria. In these descriptions, the Bidder must demonstrate its flexibility and capability to address the varying requirements and reporting needs, including, but not limited to:

- The method for making reports available to OGS and Authorized User (e.g., printed, on-line).
- Accessibility to reports (e.g., through secure Internet applications) including access requirements (e.g., hardware and software requirements, methods of identifying specific transactions), and access to historical data (i.e., data retention).
- The timing for providing such reports (i.e., the data required to produce daily/monthly reports will be delivered or made available by what time).
- The input criteria available to Authorized Users that may be used to create on-demand, online reports regarding individual transactions.

**1. Authorized User Transaction Reports and Inquiries**

To exercise control over programs, each Authorized User requires on-demand, online reports, based on Authorized User input criteria, of its purchases made with the Fuel Card. It is anticipated that in most cases daily and monthly reporting will be necessary to provide the information needed to reconcile payments and to monitor Fuel Card usage. The Contractor shall provide a website that OGS and the Authorized User may access to produce Authorized User transaction reports in both Excel and text formats. OGS shall require the ability to produce reports that include data for multiple Authorized Users, and also statewide reports. The Authorized User, at their discretion, may opt to have the Contractor remove information which may identify individual Cardholders from the data available to OGS. The transaction reports and the data collected to produce the reports are confidential and may only be shared with other parties with the prior approval of the Authorized User. Data for activity on fictitious accounts, as described in Section VI.2 B(9), shall not be made available to OGS without prior approval by the Authorized User.

Unless otherwise specified by an Authorized User, the data that is required per transaction, in a searchable on-line database, includes:

- a) Identification of Authorized User, including agency name and State assigned agency code;
- b) Fuel Card account number;
- c) Fuel Card status (active or inactive)
- d) Identification of Cardholder, as allocated by the Authorized User (i.e., individual, vehicle and/or department);
- e) Transaction time, date and Fuel Location (available in separate fields);
- f) Odometer reading, if Cardholder input is required for the transaction;
- g) Fuel type or Associated Product description;
- h) Number of gallons in tenths;
- i) Gross/pump price per gallon;
- j) Retail price of Associated Product;

- k) Applicable NYS discount(s) and taxes exempted;
- l) Net price per gallon;
- m) Net price of Associated Product;
- n) Total amount per transaction; and
- o) Total amount of purchases per Fuel Card.

**2. Exception Reports**

The Authorized Users require on-demand, online reporting that includes the identification of Fuel Card usage outside the specified Fuel Card options, including:

- a) Weekend and after hour purchase;
- b) Unauthorized Fuel Location, Fuel type, or Associated Product purchases;
- c) Multiple purchases in the same day;
- d) Fuel purchases beyond the capacity of the vehicle's Fuel tank; and
- e) Fuel purchases in excess of the authorized quantity.

**3. Quarterly Summary Reports for Control Agencies**

Contractor shall furnish quarterly reports containing all Authorized User Fuel and Associated Product Contract transactions that have occurred during the quarter, to OGS, for purposes of supporting program monitoring and Contract administration. Reports shall be delivered within thirty (30) days of the close of the quarterly period. Quarterly periods will end on March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup> and December 31<sup>st</sup>. If the Contract period begins or ends in a fractional portion of a reporting period only the actual Contract sales for this fractional period should be reported in that quarterly report.

The report is to be submitted electronically in Microsoft Excel format to the Office of General Services, Procurement Services, Tower Bldg., Empire State Plaza, Albany, NY 12242, to the attention of the individual shown on the front page of the Contract Award Notification and shall reference the Group Number, the Award Number, Contract Number, sales period, and Contractor's (or other authorized agent) name.

The sales report Excel template is provided in this Solicitation as Attachment 10. The report shall include, but is not limited to, total number of gallons purchased, total dollar amount of Associated Products purchased, and the total dollar amount spent in the reporting period per Authorized User. The reporting system must be able to produce reports detailing the individual transactions made using the fuel card. OGS reserves the right to require reports with detailed data other than total gallon volume, total Associated Product volume and total dollar volume. Data for activity on fictitious accounts, as described in Section VI.2B(9), shall not be made available to OGS without prior approval by the Authorized User.

The State shall have the right to verify said report and to take any action(s) necessary to enforce its rights under this paragraph, including but not limited to the right to stop payments until such reports are received, audit Contractor's applicable Contract books, to substitute, in its sole judgment, a good faith estimate of Contract usage upon failure of Contractor to deliver said report as required where pricing is based upon aggregate volume, or to terminate the Contract for cause or seek other judicial relief.

**E. Training and Help Desk Services (Mandatory)**

**1. Training**

The Bidder must describe the types of implementation and on-going training to be made available to Authorized User throughout the term of the Contract related to the Fuel Card Services program. The Bidder must provide each Authorized User with all necessary training for the Fuel Card Services program, including user manuals and system documentation, at no additional cost.

For purposes of this RFP, the Bidder shall provide details and confirm that the training program to be provided will accomplish the goals of providing Authorized User with:

- a) A thorough understanding of Fuel Card acceptance and processing;
- b) An understanding of Authorized User reports and reconciliation procedures;
- c) Guidance in developing Authorized User internal reports; and
- d) An understanding of security requirements and fraud prevention/detection.

- e) An understanding of what Additional Products may or may not be purchased using the Fuel Card

## 2. **Help Desk Services**

The Bidder must furnish a description of all Help Desk Services to be made available during the entire term of the Contract. Help Desk Services must be provided at no additional cost.

The Bidder must provide Help Desk Services for Authorized User based on a twenty-four (24) hours per day, seven (7) days per week basis, including holidays, in order to address all Authorized User customer assistance needs and technical issues. The Authorized User assistance line(s) must be a toll free number(s) which provide direct assistance, intake service with follow-up resolution and requests for escalated assistance.

- a) The Bidder must describe the system to be used in providing Help Desk Services to Authorized User. This description should include but not be limited to: access to the system, number of lines available and staffing levels and experience, blockage rates and not to exceed times on hold.
- b) The Bidder must describe the Help Desk Services to be made available to Authorized User. This description must include the Fuel Card transaction authorization, assistance for changing Fuel Card usage settings, assistance for reporting lost or stolen cards, verification and inquiry services for Bidder provided Fuel Card Services, and all other customer assistance services.
- c) The Bidder must identify the types of issues the Help Desk can respond to on a twenty-four (24) hours per day, seven (7) days per week basis and the anticipated average response time for each of these issues. Transaction authorization and verification, and the ability to report and cancel lost or stolen Fuel Cards, must be available on twenty-four hours per day, seven (7) day per week basis, including holidays.
- d) Describe any additional Help Desk Services or other assistance available to Authorized User at no additional cost.

## F. **Invoicing (Mandatory)**

Unless otherwise agreed upon in writing between the Authorized User and the Contractor, Fuel and Associated Product costs must be separately invoiced on a monthly basis to each participating Authorized User. In order to allow for the aggregation of the NYS discount, all Authorized Users of the Contract shall be invoiced on the same billing cycle. *Note: See Appendix B, §45 Contract Invoicing and §47 Prompt Payments.* The Bidder must describe the invoicing process and affirm that invoices shall, at minimum, include the following level of detail:

1. Total gallons of Fuel in tenths, and volume of Associated Product purchased during the billing period;
2. Total Gross/pump price of Fuel, and retail price of Associated Product purchased;
3. NYS discount(s) deducted;
4. Taxes deducted; and
5. Net amount due from the Authorized User.

In addition to the summary invoice described above, a transaction detail report must be available for download from a secure location at the Contractor's website or submitted directly to the Authorized User in an Excel spreadsheet. The transaction detail report must match the billing cycle of the invoice and provide the level of detail listed in Section VI.2D1, *Authorized User Transaction Reports and Inquiries*.

**Bidder must provide a sample New York State Invoice and accompanying transaction detail report.**

## G. **Security & Confidentiality (Mandatory)**

The Contractor is responsible for Authorized Users' security needs, the security of the transaction data and processing procedures and for compliance with all applicable state laws pertaining to the security of transaction data in connection with the provision of Services hereunder; provided, however, that Contractor will not be responsible for any security breaches or non-compliance with Federal or State law or terms of this Contract which breaches or non-compliance results from any act or omission of the Authorized User or a third party unrelated to the negligence of Contractor.

The Contractor is also responsible for compliance with all applicable state and federal laws pertaining to the security of data. Additionally, the Contractor must adhere to the security and confidentiality procedures of Authorized User and implement procedures sufficient to enforce such privacy for all services provided under the Contract. To that end, the Contractor's employees may be required to sign agreements to adhere to such laws, rules and/or procedures. The Contractor must store any electronic payment processing data in an encrypted data format sufficient to preserve such security.

The Contractor will be required to comply with the confidentiality and security requirements of Appendix B, §52. *Security*. Individually identifiable material and information relating to a Cardholder, security codes or encryption methods, or other confidential information regarding the Authorized User's business operations or data, shall be held confidential in accordance with these requirements and shall not be disclosed by the Bidder, its officers, agents or employees or subcontractors, without the prior written approval of the Authorized User and, where applicable, the individual Cardholder, as allocated by the Authorized User.

Except as directed by OGS, a court of competent jurisdiction, or as necessary to comply with applicable New York State or Federal law(s) or regulation(s), and with the written consent of the individual Cardholder, where applicable (see Section VI.2B(9) above), no data records or other information may be otherwise used, released or sold to any third party by the Contractor. The Contractor is further prohibited from releasing data records or other information to its joint venture, partners, employees, agents or subcontractors, either during the term of the Contract or in perpetuity thereafter, unless such party is directly processing the data or providing a service that requires access to the data. Where such party is directly processing the data or providing a service that requires access to the data, the Contractor shall be responsible for insuring such party's compliance with the provisions of this paragraph. The Contractor shall be responsible for assuring that any agreement between the Contractor and any of its joint venture, partners, officers, agents, employees or subcontractors contains a provision that strictly conforms to these provisions.

**1. Security Plan**

The Bidder must affirm that Bidder will have a security plan in place before the Contract start date, that will be utilized to ensure the protection of Authorized User information and that access to such information is controlled and restricted to authorized personnel only, as well as procedures to secure Fuel Card use at Fuel Locations, transactions on the Internet, transaction receipts and sales reports. Include with Bid:

- a) A list and description of relevant security software, including data encryption;
- b) Administrative rules relative to security of data.

**2. Fraud Prevention**

The Bidder must identify in the bid the methods used to detect, report and prevent fraud, theft, and all other security breaches, including examples of detection reports of unauthorized attempts.

**3. Internal Control Plan**

The Bidder must affirm in the bid that Bidder has an internal control plan that shall include checks and balances for all aspects of the services provided including internal controls for all automated and manual processes, and controls to protect against unauthorized access to personal information.

**H. Implementation Plans (Mandatory)**

As an Authorized User implements a Fuel Card Services program, the Contractor must agree to work with each Authorized User to develop a mutually agreed upon implementation plan which specifies the timetable for deliverables, and procedures and training for the Fuel Card Services program.

1. Information must be included in the Bid response affirming the Bidder's intent to work with each Authorized User to establish Fuel Card Services and to set up a plan for initial and continuing training as required by the individual Authorized User's needs and timeframes.
2. The Bidder must include in their Bid response a description of their standard methodology for implementation and expansion of the Fuel Card Services.
3. The Bidder must describe in their Bid response its capacity to implement the Fuel Card Services program, indicating the expected timeframe for implementing various sized programs and its capacity to implement multiple programs.

**I. Integration of Bidder's Fuel Card with Contract Users Independent Fuel Stations, including Existing State-Owned Facilities (Mandatory)**

In addition to acceptance at retail outlets, the State requires that the successful Bidder's Fuel Card be coded for acceptance at the card reading equipment located at any contract users' Independent Fuel Station. Currently there are approximately 300 New York State-Owned automated Independent Fuel Stations that utilize EJ Ward equipment. In addition to card use at retail fueling stations the Bidder's Fuel Card may be used to authorize transactions made at contract users Independent Fuel Stations. Each month during State fiscal year 2016 (April 2016 – March 2017) an average of 59,740 Fuel Cards were available for use, with an average of 25,341 cards actively being used within the month. Out of the total number of cards in circulation at any given time, it is estimated that approximately 18,000 Dual Use Fuel

Cards will be requested by NY State Agencies for use at the approximately 300 aforementioned Independent Fuel Stations (Note: This number is only a projection and is subject to change without notification. Additionally, a portion of the cards requested for Dual Use potentially may only be used at user-owned Independent Fuel Stations and have no record of commercial use).

The following requirements will be necessary:

- a) When requesting a Fuel Card from the successful Bidder, the authorized contract user shall indicate that the requested Fuel Card requires functionality at their Independent Fuel Stations and also what their equipment and requirements are. The Bidder will be required to see that the cards are properly coded for use at these stations/facilities, which may require the successful bidder to deal with the Contract Users Independent Fuel Station representative or the company providing the equipment/system, at the direction of the contract users representative. It is expected that one individual or office will be the point of contact or representative for facilitation for each entity requiring Dual Use Fuel Cards. For example, OGS Fleet may be the office responsible for facilitating the needs of NYS Agencies at the State facilities utilizing EJ Ward equipment and direct bidder to the appropriate EJ Ward representative to accomplish coding of cards etc.;
- b) In order to enable the acceptance of the successful Bidder's fuel card at contract user owned Independent Fuel Stations, the successful Bidder will be required to transmit daily a list of Dual Use Fuel Cards indicating which cards are authorized to make purchases at automated Independent Fuel Stations. The transmission is to be sent to a secure File Transfer Protocol (FTP) site, established by the bidder, where the list can be obtained and uploaded to the card reading equipment located at the automated Independent Fuel Stations by a party authorized by the State or authorized contract user.

The required transfer format is at the discretion of the contract user and may include but is not limited to one or more of the following formats (CSV, Excel, FTP or similar);

- c) The State requires that all lists of Dual Use Fuel Cards be transmitted to the secure FTP site by the successful Bidder, no less than once every 24 hours. It is anticipated that there will be a list sent to each entity requiring Dual Use Fuel Cards at their facilities that identifies the status of their cards only. For example, for the cards to be used at the 300 NYS facilities one file would be sent daily with the status of the cards to be used at state owned facilities;
- d) The successful bidder will need to maintain their Fuel Card's compatibility with contract users' Independent Fuel Station card reading equipment for the life of the contract, as upgrades to the equipment may require changes to the format of the daily list of Dual Use Fuel Cards;
- e) For Fuel Cards issued to a specific vehicle, the information provided in the list of Dual Use Fuel Cards may consist of the following information (information provided is for example only):

Fuel Card Issued to Vehicle Example:				
Fuel Card #	NYS Fleet Vehicle #	State Agency Code	Expiration Date	Eligibility Status
123456ABC	11111	DOT	5/23/2018	Terminated
789123DEF	11112	OCFS	9/18/2019	Active

For Fuel Cards issued in the name of a specific driver, the information provided in the list of Dual Use Fuel Cards may consist of the following information (information provided is for example only):

Fuel Card Issued to a Driver Example:					
Last Name	First Name	State Agency Code	Fuel Card #	Driver Prompt ID	Eligibility Status
Smith	John	OGS	987654ABC	123456	Active
Jones	Jane	DEC	321654XYZ	987654	Terminated

The information provided in the examples above is sufficient to validate transactions at the present time. However, please note this is subject to change and additional information may be required at the contract users' or State's request.

- f) In order to prevent unauthorized purchases, when a Fuel Card is deactivated, the State requires that the cards' status be immediately changed to "Not Authorized" on the list of Dual Use Fuel Cards, as appropriate;
- g) Once a Contract User submits a request to have a Fuel Card deactivated, for transactions requested at User-Owned Independent Fuel Stations the card will still receive an authorization until the daily list of Dual Use Fuel Cards can be uploaded to the equipment at the Independent Fuel Stations by a party authorized by the State or the Contract User. After the daily list has been uploaded, the Fuel Card will no longer receive an authorization for a requested transaction.

For transactions at commercial Fuel Locations, the functionality of the Fuel Card shall be turned off in accordance with the successful Bidder's standard policy for Fuel Card deactivation.

When cards are used at contract user owned or operated, independent or automated facilities, it is expected that the daily file will validate the card. If the card is deactivated, then the receiving equipment is expected to not accept the card or decline the transaction. If the card has been activated and authorized to make transactions, then the equipment is expected to accept the card and at this point the bidder's obligations are met as the transaction will be internal with no further data transmitted back to the bidder.

Should this aspect of the award become unworkable, the State reserves the right to not make an award on this portion or eliminate the requirement.

#### J. Other Services (Desired)

The following Fuel Card Services are desired.

1. Security alerts identifying Fuel Card usage outside the Authorized User specified Fuel Card options sent via email to an individual designated by the Authorized User; and
2. Acceptance of electronic Automated Clearing House (ACH) payments from State Agencies in accordance with the Guidelines and Rules posted on the Office of the State Comptroller's website. <http://www.osc.state.ny.us/epay/epayguide.pdf>.
3. Deduction of all applicable federal, state and local government taxes for Associated Product prior to invoicing the Authorized User.
4. **Non-Referenced and Emerging Fuels:** If a type of fuel is not referenced in this Solicitation or if a new type of fuel becomes available during the term of the resultant contract from a commercial/retail source that contractor has or can enter into a relationship with to provide the non-referenced/emerging fuel, then it may be made available for purchase by Authorized Users. The Successful Bidder shall seek OGS approval prior to making the new fuel available to Authorized Users.

## SECTION VII. BIDDER FINANCIAL REQUIREMENTS

### VII.1 GENERAL GUIDELINES

Bidder must complete Attachment 2 - *Part II -- Financial Submittal (Discount Tables)*, as provided. Bidder shall not modify or change the formatting.

## SECTION VIII. ADMINISTRATIVE BID SUBMISSION

### VIII.1 BID SUBMISSION

Complete bids in response to this RFP are to be packaged, sealed and submitted to OGS Procurement Services. Responses shall be delivered to the following address on or before 11:00 a.m. ET, on or before the Bid opening date:

State of New York Executive Department  
Office of General Services  
Procurement Services  
Corning Tower - 38th Floor Reception Desk  
Empire State Plaza  
Albany, NY 12242

Bidder assumes all risks for timely, properly submitted deliveries. The time of Bid receipt is determined by OGS according to the clock at the above-noted location. A Bidder is strongly encouraged to arrange for delivery of Bids to OGS prior to the date of the Bid opening. Late Bids shall be rejected, except as provided in Appendix B §5,, *Late Bids*. All Bids and accompanying documentation shall become the property of the State of New York and shall not be returned.

## **VIII.2 BID ENVELOPES AND PACKAGES**

All Bids should have a label on the outside of the envelope or package itemizing the following information:

1. BID ENCLOSED (preferably bold, large print, all capital letters)
2. Solicitation number (RFP #23062)
3. Bid Opening Date and Time
4. The number of boxes or packages (e.g., 1 of 2; 2 of 2)

Failure to complete all information on the Bid envelope and/or package may necessitate the opening of the Bid prior to the scheduled Bid opening.

## **VIII.3 IMPORTANT BUILDING ACCESS PROCEDURES**

To access the Corning Tower, all visitors must check in by presenting photo identification at the information desk. Delays may occur due to a high volume of visitors. Visitors conducting Procurement Services business are encouraged to pre-register for building access by contacting the Procurement Services receptionist at (518) 474-6262 at least 24 hours prior to the visit. Visitors who are not pre-registered will be directed to a designated phone to call the Procurement Services receptionist. The receptionist will register the visitor at that time but delays may occur. Building access procedures may change or be modified at any time.

## **VIII.4 NYS RESERVED RIGHTS**

New York State reserves the right, in its sole discretion, to:

- A. Reject any or all Bids received in response to the Solicitation;
- B. Withdraw the Solicitation at any time at the sole discretion of the State;
- C. Make an award under the Solicitation in whole or in part;
- D. Disqualify any Bidder whose conduct and/or Bid fails to conform to the requirements of the Solicitation;
- E. Seek clarifications and revisions of the Bid;
- F. Amend the Solicitation prior to the Bid opening to correct errors or oversights, or to supply additional information as it becomes available;
- G. Direct Bidders, prior to the Bid opening, to submit Bid modifications addressing subsequent Solicitation amendments;
- H. Change any of the schedule dates with notification through the NYS Contract Reporter;
- I. Eliminate any mandatory, non-material requirements that cannot be complied with by all of the prospective Bidders;
- J. Waive any requirements that are not material;
- K. Utilize any and all ideas submitted in the Bids received;
- L. Adopt all or any part of a Bidder's Bid in selecting the optimum configuration;
- M. Negotiate with a Bidder within the Solicitation requirements to serve the best interests of the State. This includes requesting clarifications of any or all Bids;
- N. Require clarification at any time during the procurement process and/or require correction of arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of a Bidder's Bid and/or to determine a Bidder's compliance with the requirements of the Solicitation;



- O. Select and award the Contract to other than the selected Bidder in the event of unsuccessful negotiations or in other specified circumstances as detailed in the Solicitation;
- P. Accept and consider for Contract award Bids with non-material Bid Deviations or non-material Bid defects such as errors, technicalities, irregularities, or omissions;
- Q. Use any information which OGS obtains or receives from any source and determines relevant, in OGS's sole discretion, for the purposes of bid evaluation and Contractor selection;
- R. Consider a proper alternative where an evidently incorrect reference/parameter/component/product/model/code number is stated by the State or the Bidder;
- S. Reject an obviously unbalanced Bid as determined by the State; and
- T. Conduct Contract negotiations with -the next responsible Bidder, should the Agency be unsuccessful in negotiating with the selected Bidder;
- U. Make no award for any Product, region, or lot, as applicable, for reasons including, but not limited to, unbalanced, unrealistic or excessive Bidder pricing, a change in Authorized User requirements and/or Products, or an error in the Solicitation (e.g., use of incorrect reference, pack size, description, etc.). In such case, evaluation and ranking of Bids may be made on the remaining Products, regions, or lots.
- V. Offer a Bidder the opportunity to provide supplemental information or clarify its Bid, including the opportunity to explain or justify the balance, realism, and/or reasonableness of its pricing.

## SECTION IX. PROPOSAL FORMAT AND CONTENT

### IX.1 GENERAL FORMAT OUTLINE FOR PARTS I AND II

This section identifies the information that the Bidder must include in their proposals to OGS.

*Note: Electronic copies shall be submitted on CD-ROM in Windows format (2013 or later versions). Where the term "CD-ROM" is used, it shall be understood that any of the following electronic media may be used: CD-ROM, DVD or Flash Drive. Each CD-ROM must be labeled on the outside with: (1) Name and address of Bidder; (2) The Request for Proposals Number, as indicated on page one (1) of this RFP; and (3) The file format and version of Word or Excel used to complete the downloaded documents. In the event there is a discrepancy between the information in the hard copy of the proposal and the electronic copy of the proposal, the hard copy of the proposal controls.*

#### A. Overview

**Bidder must follow the instructions set forth below.** The rules established for proposal content and format will be enforced and variations from the rules prescribed herein may subject the Bidder to disqualification.

#### B. Submission of Sealed Proposals

Bidder's proposals must be submitted in sealed packages and received by the time and date specified in Section I.6, *Key Events and Dates*. Each proposal must be submitted in two (2) separate parts:

1. **Part I -- Technical Submittal**, including hard copy and CD-ROM, must be completed separately and sealed separately from Part II in order that the technical and financial evaluations may be accomplished independently and concurrently, and the evaluation of the Technical Qualifications & Service Requirements submittal can be made strictly on the basis of its merits.
2. **Part II -- Financial Submittal**, including hard copy and CD-ROM, shall not be included in the Part I sealed envelope and shall be submitted in another sealed envelope. **If Part II information is included within the same sealed envelope as the Part I information, Bidder's proposal will be disqualified.** Both Part I and Part II should however, be included in the same box/package delivered to OGS.

***Note: If the Bidder is including material designated as confidential/proprietary it must be identified in accordance with Section IX.2 PART I, RESPONSE TO SECTION VI, BIDDER TECHNICAL QUALIFICATIONS & SERVICE REQUIREMENTS and included with the Bidder's Part 1 Technical Submittal materials***

All proposals must be completed in ink or be machine produced.

#### C. General Proposal Appearance

1. **Bound Proposals:** Proposals should be bound, which may include submission in a binder. The full, legal name of the firm submitting the proposal must appear on the outside front cover of each bound proposal, together with the name and address of the OGS contact for inquiries, as given in Section I.7, *Vendor Inquiries*.

2. **Table of Contents:** Each proposal should incorporate a uniform Table of Contents following the numbering and subject matter outline described below. The Table of Contents will be used to evaluate conformance to uniform proposal content and format.
3. **Index Tabs:** Each proposal should have index tabs to identify the major sections of the proposal as they are identified below and in the Bid Submittal Checklist.
4. **Page Numbering:** Each page of each part of the proposal (i.e., Part I – *Technical Submittal* and Part II – *Financial Submittal*) should be numbered.

**D. Copies of Proposal**

OGS requires the following in any bid submittal:

1. **One (1) original hard copy and five (5) electronic copies** of **Part I** of the proposal, bound per IX.1C1, *Bound Proposals*, above.
2. **One (1) original hard copy and five (5) electronic copies** of **Part II** of the proposal, bound per IX.1C1, *Bound Proposals*, above.
3. Part I and Part II must be sealed separately (e.g., all copies of Part I together in one box and all copies of Part II together in a second box). Both Part I and Part II should however, be included in the same box/package delivered to OGS
4. In the event there is a discrepancy between the information in the hard copy of the proposal and the electronic copy of the proposal, the hard copy of the proposal controls.

**IX.2 PART I, RESPONSE TO SECTION VI, BIDDER TECHNICAL QUALIFICATIONS & SERVICE REQUIREMENTS**

The following documents should be submitted for Part I – *Technical Submittal* (**one (1) hard copy and five (5) electronic copies of your proposal are mandatory**):

- 1) **Table of Contents:** Include a Table of Contents outlining each section of the proposal. The Table of Contents should follow the general outline presented below.
- 2) **Attachment 1 - Bidder Response Forms Part I – Technical Submittal:** Include completed copies of the following materials:
  - A. Bidder's Affirmation of Qualifying Technical Requirements Checklist
  - B. Bidder's Response To Technical Requirements Table
- 3) **Required Documents:** Include completed copies of the following materials with original signatures as appropriate:
  - A. Completed original of the RFP cover page;
  - B. Signed original of RFP page 2;
  - C. Attachment 4 – Revised Bid Submittal Checklist;
  - D. Attachment 5 – Revised General Questions & Contact Information;
  - E. Attachment 6 – New York State Required Certifications;
  - F. Attachment 7 – Encouraging Use of NYS Businesses
  - G. Attachment 8 – Use of Service-Disabled Veteran-Owned Business Enterprises in Contract Performance
  - H. Attachment 9 – Contractor's Insurance Requirements: Any and all documents required as specified in this attachment
- 4) **Acceptance with Conditions:** This section of the Proposal sets forth any and all exceptions that the Bidder may have to terms and conditions contained in the RFP (terms and conditions shall be understood to be accepted without condition unless specific exceptions are taken). See also Section IV.3, *Bid Deviations*. Include copies of standard Fuel Card Services industry definitions which substantially differ or conflict with or are additional to the definitions set forth in Section II.2, *Definition of Terms*, of this RFP and standard Fuel Card Services industry terms and conditions which Bidder believes conflict with any terms in this RFP.
- 5) **Confidential/Proprietary Information:** Any information or documentation in the Bidder's proposal (Technical and Financial) is assumed by the State to be available under the Freedom of Information Act, unless otherwise indicated by the Bidder. If there is any material that the Bidder would like to designate as confidential or proprietary, the Bidder must provide the Section reference or the specific text in accordance with the requirements set forth in Appendix B §6 *Confidential/Trade Secret Materials*. Such requests for confidentiality will be processed in accordance with NYS Public Officers Law Article 6.

### IX.3 PART II, RESPONSE TO SECTION VII, *BIDDER FINANCIAL REQUIREMENTS*

Part II of the proposal consists of the pricing proposal that sets forth the Fuel and Associated Product Discount(s). The price submission should be complete, accurate and well documented. Price information is not to be included in Part I – *Technical Submittal*, (response to Section VI, *Bidder Technical Qualifications & Service Requirements*). The pricing proposal will be evaluated for reasonableness of discount. Any pricing conditions or contingencies must be clearly stated. All discounts must be inclusive of all direct and non-direct costs as well as all overhead, fees, copyrights or licensing and profit.

The following documents should be submitted for Part II – *Financial Submittal*. **One (1) hard copy and five (5) electronic copies of your proposal are mandatory:**

1. **Attachment 2 - Bidder Response Forms Part II – Financial Submittal (Discount Tables):** Include the completed Excel spreadsheet.

## SECTION X EVALUATION OF PROPOSALS

### X.1 “BEST VALUE” EVALUATION

It is the State’s intent to award the Contract to a single Bidder which provides the “best value” to the State based on the Technical and Financial proposals.

### X.2 STATE EVALUATION PHILOSOPHY

New York State evaluates bids for goods and services in an objective, comprehensive manner designed to benefit both the State and participating vendors. Through this process the State identifies Bidders who will best meet its needs and will be cost effective.

The State further intends that all proposals will be evaluated uniformly and consistently, ensuring that Bidders each have an equal opportunity to be considered. The evaluation process will be conducted as described in this Section.

### X.3 EVALUATION PROCESS AND CRITERIA

Proposals will be evaluated based on the administrative, technical, and financial criteria described below. The administrative aspect of this Solicitation will be scored as either Pass or Fail based on the contents of the Bidder’s Bid Submission, in accordance with the pre-established criteria listed below in Section X.4, *Administrative Review*. The technical proposals will be scored based on the information provided by the Bidder in Attachment 1 – Bidder Response Forms Part I -- *Technical Submittal*, in accordance with the pre-established criteria listed below in Section X.5, *Technical Submittal – Fuel Card Services*. The financial portion of the proposal will be scored based on information provided by the Bidder in Attachment 2 – Bidder Response Forms Part II – *Financial Submittal*, in the manner outlined in Section X.6, *Financial Submittal – Discounts*.

The proposal selected will be the one determined to provide the “Best Value” to the State of New York with the highest overall point total for Sections X.5 and X.6. The evaluation process will comprise of comparative analysis of administrative, technical and financial criteria.

- A. **Administrative Review:** All proposals will first be reviewed to ensure they are complete with all submissions required at the time of bid opening and meet the minimum mandatory requirements for both technical and financial criteria. Those bids that are incomplete and do not meet the minimum mandatory requirements may be rejected and may not be scored.
- B. **Technical and Financial Review:** The State will conduct an evaluation of the technical proposal for the Fuel Card program concurrently, but separately from the financial evaluation of the proposal. The technical and financial criteria shall each be weighted according to the chart below to arrive at the selection of the proposal that offers the best value to the State of New York.

EVALUATION CRITERIA	WEIGHT
<b><u>Administrative Review:</u></b> Bidder has submitted Bid in accordance with the procedures outlined in <i>Section VIII. Administrative Bid Submission</i> and has submitted the required materials as specified in <i>Section X.4 Administrative Review</i>	<b>Pass/Fail</b>

<b><u>Bidder Response Forms Part 1 – Technical Submittal:</u></b> Bidder response to technical criteria specified in Section VI, <i>Bidder Technical Qualifications &amp; Service Requirements</i> .	<b>30%</b>
<b><u>Bidder Response Forms Part 2 – Financial Submittal:</u></b> The Proposed Primary Fuel Discount(s), as specified by Bidder in Attachment 2 - Bidder Response Forms <i>Part II -- Financial Submittal (Discount Tables)</i> , will be evaluated based on the Primary Fuel Discount offered at the Bidder's Fuel Locations. <i>Note: Associated Product discount(s) will be scored.</i>	<b>70%</b>

#### X.4 ADMINISTRATIVE REVIEW

Prior to a Bidder's Technical and Financial Submittal's being reviewed, the Bidder's submission will be reviewed for completeness in order to ensure all materials required for evaluation have been submitted.

The following items are required to be submitted and should be included with the Bidder's Bid Submission:

- A. Completed original of the RFP cover page;
- B. Signed original of RFP page 2;
- C. Fully completed Part 1 - Technical Submittal as outlined in Section IX.2 *Part I, Response To Section VI, Bidder Technical Qualifications & Service Requirements*, including the required amount of hard and electronic copies;
- D. Fully completed Part 2 - Financial Submittal as outlined in Section IX.3 *Part II, Response To Section VII, Bidder Financial Requirements*, including the required amount of hard and electronic copies;
- E. Completed hard and electronic copies of **Attachment 4 – Revised Bid Submittal Checklist**;
- F. Completed hard and electronic copies of **Attachment 5 – Revised General Questions & Contact Information**;
- G. Completed and signed hard and electronic copies of **Attachment 6 – New York State Required Certifications**
- H. Completed and signed hard and electronic copies of **Attachment 7 – Encouraging Use of NYS Businesses**
- I. Completed and signed hard and electronic copies of **Attachment 8 – Use of Service-Disabled Veteran-Owned Business Enterprises in Contract Performance**

#### X.5 TECHNICAL SUBMITTAL – FUEL CARD SERVICES

The Technical Evaluation Committee will not have access to the Financial submittals prior to the completion of evaluation of all Technical proposals and recommendation of final scoring to OGS.

The State will use a Technical Evaluation Committee and a Technical Evaluation Packet (including guidelines and score sheets), established prior to the bid opening, to conduct a technical evaluation of the Fuel Card program. The technical proposal will be scored based on the technical items listed below. The items are listed in descending order of importance with items higher on the list weighted more heavily than the technical items lower on the list.

- A. Fuel Location network: Availability of Fuel Locations for purchasing Fuel, and type of Fuel and Associated Product provided;
- B. Bidder's ability to provide mandatory Fuel Card Services as described in the RFP;
- C. Availability of electronic data and reports; and
- D. Security benefits and features of Bidder's program;
- E. Ability to use Bidder's Fuel Card as a means to authorize transactions at Contract Users Independent Fuel Stations, including existing State-Owned facilities; and
- F. Ability of Bidder to issue invoices and deduct all applicable taxes; and
- G. Qualifications and experience of Bidder to provide the services described in the RFP;
- H. Customer support, implementation, and training; and
- I. Other desired services offered by Bidder

*The Technical Evaluation Committee scoring will be conducted in the following manner:*

- A. Each Technical Evaluation Committee member will use separate score sheets and separately score the technical submittal of each of the bid proposals.

- B. The Technical Evaluation Committee will then tabulate and average those scores.

*The Technical Evaluation Committee shall document for the record the points awarded to each proposal and the specific reasons and rationale for awarding of such points and will develop a single narrative description of this process.*

#### **X.6 FINANCIAL SUBMITTAL – DISCOUNTS**

OGS will conduct the financial evaluation and scoring. The financial proposal will be evaluated concurrently but separately from the technical proposals. The financial analysis and scoring will generally be conducted in the following manner:

**A. Fuel Discount(s):**

The State will review the Primary Fuel Discount tiers as specified by the Bidder in Attachment 2 - Bidder Response Forms *Part II -- Financial Submittal (Discount Tables)*, then complete mathematical calculations to determine the number of points to be awarded each Bidder. All points when calculated will be rounded to the nearest tenth of a point. The State reserves the right to weigh each of the Primary Fuel Discount tiers as it deems appropriate.

**B. Associated Product Discount(s):**

The State of New York is seeking the greatest Associated Product discount available to ensure lowest net cost to Authorized Users. The proposed Associated Product discount(s) shall be considered as part of the financial evaluation.

#### **X.7 METHOD OF AWARD**

Award for this RFP will be recommended for the Bidder **receiving the highest point total**, who is responsive and responsible, using the evaluation criteria listed above.

**A. Proposal Completeness Screening**

After the Bid opening, an administrative review will be conducted and each proposal will be screened for completeness and conformance with State requirements for Bid submission. Any proposal may be denied further consideration at this point if it does not meet these requirements.

**B. Pass/Fail for Administrative, Technical and Financial Evaluation Sections**

Bid proposals that meet the completeness screening (Pass/Fail) and are in conformance with State requirements, will then be reviewed to ensure that the Bidder has responded in the affirmative to all mandatory, qualifying criteria in the Technical section and has provided discounts for all categories in the Financial section. Failure to respond in the affirmative to any of these qualifying criteria shall result in the Bidder's proposal being disqualified.

**C. Technical and Financial Evaluation Sections**

Bidders meeting all of the Administrative, Technical, and Financial Mandatory Requirements will then have their bids scored by the Technical and Financial Evaluation Committees. The Technical and Financial Evaluations will be conducted separate and distinct from each other, by separate evaluation committees. A representative of OGS Procurement Services shall act as chairperson of the committees.

**The Technical Evaluation** will be conducted by a committee of OGS employees.

The State reserves the right to request clarification of any proposal received in response to this RFP. Such clarification concerning responses to Attachment 1 – Bidder Response Forms Part I – *Technical Submittal* shall be requested by the Evaluation Committee chairperson.

**The Financial Evaluation** will be conducted by OGS Procurement Services employees.

The State reserves the right to request clarification of any proposal received in response to this RFP. Such clarifications shall be requested by the Evaluation Committee chairperson.

## **APPENDIX A**

### **STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS**

**PLEASE RETAIN THIS DOCUMENT  
FOR FUTURE REFERENCE.**

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## **STANDARD CLAUSES FOR NYS CONTRACTS**

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licenser, licensee, lessor, lessee or any other party):

**1. EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

**2. NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

**3. COMPTROLLER'S APPROVAL.** In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$85,000 (State Finance Law Section 163.6-a). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

**4. WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this

contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.



**7. NON-COLLUSIVE BIDDING CERTIFICATION.** In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

**8. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

**9. SET-OFF RIGHTS.** The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is

available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.**

(a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.**

In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed

for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict

exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

**13. CONFLICTING TERMS.** In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

**14. GOVERNING LAW.** This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**15. LATE PAYMENT.** Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

**16. NO ARBITRATION.** Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

**17. SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

**18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS.** The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and

provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

**19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES.** In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

**20. OMNIBUS PROCUREMENT ACT OF 1992.** It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development  
Division for Small Business  
Albany, New York 12245  
Telephone: 518-292-5100  
Fax: 518-292-5884  
email: [opa@esd.ny.gov](mailto:opa@esd.ny.gov)

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development  
Division of Minority and Women's Business Development  
633 Third Avenue  
New York, NY 10017  
212-803-2414  
email: [mwbecertification@esd.ny.gov](mailto:mwbecertification@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>

The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

**21. RECIPROCITY AND SANCTIONS PROVISIONS.** Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

**22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.** If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law

Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

a contract and appears on the Prohibited Entities list after contract award.

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.**

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

**26. IRAN DIVESTMENT ACT.** By entering into this Agreement, Contractor certifies in accordance with State Finance Law §165-a that it is not on the “Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012” (“Prohibited Entities List”) posted at:

<http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded

# **APPENDIX B**

## **GENERAL SPECIFICATIONS**

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**GENERAL**

**1. ETHICS COMPLIANCE** All Bidders/Contractors and their employees must comply with the requirements of Sections 73 and 74 of the Public Officers Law, other State codes, rules, regulations and executive orders establishing ethical standards for the conduct of business with New York State. In signing the Bid, Bidder certifies full compliance with those provisions for any present or future dealings, transactions, sales, contracts, services, offers, relationships, etc., involving New York State and/or its employees. Failure to comply with those provisions may result in disqualification from the bidding process, termination of contract, and/or other civil or criminal proceedings as required by law.

**2. DEFINITIONS** Terms used herein shall have the following meanings:

**a. AUTHORIZED USER** Authorized User shall have the meaning set forth in State Finance Law Section 163(1)(k) and includes, but is not limited to, New York State Agencies, political subdivisions, local governments, public authorities, public school and fire districts, public and nonprofit libraries, and certain other nonpublic/nonprofit organizations.

**b. BID** A response to the Solicitation submitted by a Bidder to provide Products.

**c. BIDDER** Any person or entity who submits a response to the Solicitation. At the time that a Bidder executes a Contract with the State, the Bidder shall become a "Contractor." See also "Contractor."

**d. BID SPECIFICATIONS** A written description drafted by OGS or an Authorized User setting forth the specific terms of the intended procurement, which may include: physical or functional characteristics, the nature of a Product, any description of the work to be performed, Products to be provided, the necessary qualifications of the Bidder, the capacity and capability of the Bidder to successfully carry out the proposed Contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform work. Where this Appendix B is incorporated in negotiated Contracts that have not been competitively solicited, the term "Bid Specifications" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

**e. COMMISSIONER** The Commissioner of OGS or his or her designee, or, in the case of Bid Specifications issued by an Authorized User, the head of such Authorized User or his or her authorized representative.

**f. CONTRACT** The writings that contain the agreement of the Commissioner and the Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law, and which most typically include the following classifications of public procurements:

- 1. Agency Specific Contracts** Contracts where the written description for a Product or a particular scope of work is described and defined to meet the needs of one or more Authorized Users.
- 2. Centralized Contracts** Single- or multiple-award Contracts where the written description for a Product or general scope of work is described and defined by OGS to meet the needs of Authorized Users. Centralized Contracts may be awarded through multiple awards or through adoption of another

jurisdiction's contract or on a sole source, single source, emergency, or competitive basis. Once established, procurements may be made from the selected Contractors without further competition or Mini-Bid unless otherwise required by the Contract.

**3. Back-Drop Contracts** Multiple-award Centralized Contracts where OGS provides a written description for a Product or general scope of work to meet the needs of Authorized Users. Bids may be submitted either at a date and time certain or may be accepted on a continuous or periodic recruitment basis, as set forth in the Solicitation. Selection of a Contractor from among Back-Drop contract holders for an actual Product, project or particular scope of work may be subsequently made as set forth in the Contract.

**4. Piggyback Contract** A Contract let by any department, agency or instrumentality of the United States government, or any department, agency, office, political subdivision or instrumentality of any state or group of states that is adopted and extended for use by OGS in accordance with the requirements of the State Finance Law.

**5. Contract Award Letter** A letter to the successful Bidder indicating acceptance of its Bid in response to a Solicitation. Unless otherwise specified, the issuance of a letter of acceptance forms a Contract but is not an order for Product, and the Contractor should not take any action with respect to actual Contract deliveries except on the basis of Purchase Orders sent from Authorized Users.

**g. CONTRACT AWARD NOTIFICATION** An announcement to Authorized Users that a Contract has been established.

**h. CONTRACTOR** Any successful Bidder to whom a Contract has been awarded by the Commissioner.

**i. DOCUMENTATION** The complete set of manuals (e.g., user, installation, instruction or diagnostic manuals) in either hard or electronic copy, that are necessary to enable an Authorized User to properly test, install, operate and enjoy full use of the Product.

**j. ENTERPRISE** The total business operations in the United States of an Authorized User without regard to geographic location where such operations are performed or the entity actually performing such operations on behalf of the Authorized User.

**k. ENTERPRISE LICENSE** A license grant of unlimited rights to deploy, access, use and execute Product anywhere within the Enterprise up to the maximum capacity stated on the Purchase Order or in the Contract.

**l. ERROR CORRECTIONS** Machine executable software code furnished by Contractor which corrects the Product so as to conform to the applicable warranties, performance standards and/or obligations of the Contractor.

**m. GROUP** A classification of a Product that is designated by OGS.

**n. INVITATION FOR BIDS (IFB)** A type of Solicitation that is most typically used for procurements where requirements can be stated and award will be made based on lowest price to the responsive and responsible Bidder or Bidders.

**o. LICENSED SOFTWARE** Software transferred upon the terms and conditions set forth in the Contract. "Licensed Software" includes Error Corrections, upgrades, or enhancements, and any deliverables due under a technical support/maintenance or service contract (e.g., Patches, programs, code or data conversion, or custom programming).

**p. LICENSEE** An Authorized User who acquires Product from Contractor by issuing a Purchase Order in accordance with the terms and conditions of the Contract; provided that, for purposes of compliance with an individual license, the term "Licensee" shall be deemed to refer separately to the individual Authorized User who took receipt of and who is executing the Product, and who shall be solely responsible for performance and liabilities incurred. In the case of acquisitions by State Agencies, the Licensee shall be the State of New York.

**q. LICENSE EFFECTIVE DATE** The date Product is delivered to an Authorized User. Where a License involves Licensee's right to copy a previously licensed and delivered master copy of a program, the License Effective Date for additional copies shall be deemed to be the date on which the Purchase Order is executed.

**r. LICENSOR** A Contractor who transfers rights in proprietary Product to Authorized Users in accordance with the rights and obligations specified in the Contract.

**s. MINI-BID** A document used by an Authorized User containing transaction-specific requirements soliciting responses from Contractors previously qualified under a Centralized Contract for such Products.

**t. OGS** The New York State Office of General Services.

**u. PATCH** Software designed to update, fix, or improve the Product or its supporting data. This includes fixing security vulnerabilities and other bugs, including hot fixes, to improve usability or performance.

**v. PRODUCTS** Items or deliverables under any Solicitation or Contract and may include commodities, services and/or technology.

**w. PURCHASE ORDER** The Authorized User's fiscal form or format that is used when making a purchase (e.g., formal written Purchase Order, Purchasing Card, electronic Purchase Order, or other authorized instrument).

**x. REQUEST FOR PROPOSALS (RFP)** A type of Solicitation that is used for procurements where factors in addition to cost are considered and weighted in awarding the contract and where the award will be made based on "best value," as defined by the State Finance Law, to one or more responsive and responsible Bidders.

**y. REQUEST FOR QUOTATION (RFQ)** A procurement method that can be used in situations such as discretionary, sole source, single source, or emergency purchases and certain Centralized Contracts.

**z. RESPONSIBLE BIDDER** A Bidder that is determined to have financial and organizational capacity, legal authority, satisfactory previous performance, skill, judgment and integrity, and that is found to be competent, reliable and experienced, as determined by the Commissioner. For purposes of being deemed responsible, a Bidder must also be determined to be in compliance with Sections 139-j and 139-k of the State Finance Law relative to restrictions on contacts during the procurement process and disclosure of contacts and prior findings of non-responsibility under these statutes.

**aa. RESPONSIVE BIDDER** A Bidder meeting the specifications or requirements prescribed in the Solicitation, as determined by the OGS Commissioner.

**bb. SINGLE SOURCE** A procurement where two or more Bidders can supply the required Product, and the Commissioner may award the contract to one Bidder over the other.

**cc. SITE** The location (street address) where Product will be delivered or executed.

**dd. SOLE SOURCE** A procurement where only one Bidder is capable of supplying the required Product.

**ee. SOLICITATION** Writings by the State setting forth the scope, terms, conditions and technical specifications for a procurement of Product. The procurement may be undertaken on a competitive or non-competitive basis. Such writings typically include, but are not limited to: Invitation for Bids (IFB), Request for Quotations (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions that are incorporated by reference, including but not limited to Appendix A (Standard Clauses for NYS Contracts), Appendix B (General Specifications), and identified attachments. Where the procurement is undertaken on a non-competitive basis, the term "Solicitation" shall be deemed to refer to all the terms and conditions identified by the State.

**ff. SOURCE CODE** The programming statements or instructions written and expressed in any language understandable by a human being skilled in the art which are translated by a language compiler to produce executable machine object code.

**gg. STATE** State of New York.

**hh. STATE AGENCY OR AGENCIES** The State of New York, acting by or through one or more departments, boards, commissions, offices or institutions of the State of New York.

**ii. SUBCONTRACTOR** Any individual or legal entity (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) who has entered into a contract, express or implied, for the performance of a portion of a Contract with a Contractor.

**jj. TERMS OF LICENSE** The terms and conditions set forth in the Contract that are in effect and applicable to a Purchase Order at the time of order placement.

**kk. THIRD-PARTY SOFTWARE** Any software that is developed independently of Contractor and which may be governed by a separate license.

**ll. VIRUS** Any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer. Virus shall also include any malware, adware, or other computer code, whether or not written or conceived by Contractor, that allows data or metrics to be copied, redirected, or modified without the express consent of the Authorized User.



**BID SUBMISSION**

**3. INTERNATIONAL BIDDING** All Bids, including all information and Product required by the Solicitation or provided as explanation thereof, shall be submitted in English. All prices shall be expressed, and all payments shall be made, in United States Dollars (US\$). Any Bids submitted which do not meet the above criteria will be rejected.

**4. BID OPENING** Bids may, as applicable, be opened publicly. The Commissioner reserves the right at any time to postpone or cancel a scheduled Bid opening.

**5. LATE BIDS** Bids must be received at the location designated in the Solicitation at or before the date and time established in the Solicitation for the Bid opening or receipt of Bids.

Any Bid received at the designated location after the established time will be considered a Late Bid. A Late Bid may be rejected and disqualified from award. Notwithstanding the foregoing, a Late Bid may be accepted in the Commissioner's sole discretion where (i) no timely Bids meeting the requirements of the Solicitation are received, (ii) in the case of a multiple award, an insufficient number of timely Bids are received to satisfy the multiple award, or (iii) the Bidder has demonstrated to the satisfaction of the Commissioner that the Late Bid was caused solely by factors outside the control of the Bidder. However, in no event shall the Commissioner be under any obligation to accept a Late Bid.

The basis for any determination to accept a Late Bid shall be documented in the procurement record.

**6. CONFIDENTIAL/TRADE SECRET MATERIALS**

**a. BIDDER/CONTRACTOR** Confidential, trade secret or proprietary materials as defined by the laws of the State of New York must be clearly marked and identified as such upon submission by the Bidder/Contractor. Marking the Bid as "confidential" or "proprietary" on its face or in the document header or footer shall not be considered by the Commissioner or Authorized User to be sufficient without specific justification as to why disclosure of particular information in the Bid would cause substantial injury to the competitive position of the Bidder/Contractor. Bidders/Contractors intending to seek an exemption from disclosure of these materials under the Freedom of Information Law must request the exemption in writing, setting forth the reasons for the claimed exemption. The Commissioner's or Authorized User's receipt/acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures. Properly identified information that has been designated confidential, trade secret, or proprietary by the Bidder/Contractor will not be disclosed except as may be required by the Freedom of Information Law or other applicable State and federal laws.

**b. COMMISSIONER OR AUTHORIZED USER** Contractor warrants, covenants and represents that any confidential information obtained by Contractor, its agents, Subcontractors, officers, distributors, resellers or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the State or any Authorized User hereunder or received from another third party, will not be divulged to any third parties without the written consent of the Commissioner or Authorized User. Contractor shall not be required to keep confidential any such material that is publicly available through no fault of Contractor, independently developed by Contractor without reliance on confidential information

of the Authorized User, or otherwise obtained under the Freedom of Information Law or other applicable New York State laws and regulations. This warranty shall survive termination of this Contract. Contractor further agrees to take commercially reasonable steps to inform its agents, Subcontractors, officers, distributors, resellers or employees of the obligations arising under this clause to ensure such confidentiality.

**7. PREVAILING WAGE RATES - PUBLIC WORKS AND BUILDING SERVICES CONTRACTS** If any portion of work being solicited is subject to the prevailing wage rate provisions of the Labor Law, the following shall apply:

**a. PREVAILING WAGE RATE APPLICABLE TO BIDS** A copy of the applicable prevailing wage rate schedule is incorporated into the Solicitation and may also be obtained by visiting [www.labor.ny.gov](http://www.labor.ny.gov) and typing in the search box: Prevailing Wage Schedule Request. Bidders must submit Bids which are based upon the prevailing hourly wages, and supplements in cash or equivalent benefits (e.g., fringe benefits and any cash or non-cash compensation which are not wages, as defined by law) that equal or exceed the applicable prevailing wage rates for the location where the work is to be performed. Bidders may not submit Bids based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. Bids that fail to comply with this requirement will be disqualified.

**b. WAGE RATE PAYMENTS/CHANGES DURING CONTRACT TERM** The wages to be paid under any resulting Contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep informed of all changes in the prevailing wage rates during the Contract term that apply to the classes of individuals supplied by the Contractor on any projects resulting from this Contract, subject to the provisions of the Labor Law. Contractor is solely liable for and must pay such required prevailing wage adjustments during the Contract term for its employees as required by law and is responsible for ensuring any Subcontractors utilized on the Contract also comply with the prevailing wage provisions of the New York State Labor Law.

**c. ARTICLE 8 CONSTRUCTION/PUBLIC WORKS CONTRACTS** In compliance with Article 8, Section 220 of the New York State Labor Law:

**i. Posting** The Contractor must publicly post on the work Site, in a prominent and accessible place, a legible schedule of the prevailing wage rates and supplements.

**ii. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over \$25,000 where the Contractor maintains no regular place of business in the State, such records must be kept at the work Site. For building services contracts, such records must be kept at the work Site while work is being performed.

**iii. Submission of Certified Payroll Transcripts for Public Works Contracts Only** Contractors and Subcontractors on public works Contracts must submit monthly payroll transcripts to the Authorized User issuing the Purchase Order for the work. This provision does not apply to Article 9 of the Labor Law building services contracts.

**iv. Day's Labor** No laborers, workmen or mechanics in the employ of the Contractor, Subcontractor or other person doing or

contracting to do all or part of the work contemplated by the Contract shall be permitted or required to work more than eight hours in any one calendar day or more than five calendar days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. "Extraordinary emergency" shall be deemed to include situations in which sufficient laborers, workers and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the NYS Commissioner of Labor for the preservation of the Contract Site or for the protection of the life and limb of the persons using the Contract Site.

**d. ARTICLE 9 BUILDING SERVICES CONTRACTS** In compliance with Article 9, Section 230 of the New York State Labor Law:

**i. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. Where the Contractor or Subcontractor maintains no regular place of business in New York State, such records must be kept at the work Site while work is being performed.

**ii. Overtime** Employees of Contractors and Subcontractors who work in excess of eight hours in a day or forty hours in a week shall be paid at the overtime rate identified by the New York State Department of Labor.

## **8. TAXES**

**a.** Unless otherwise specified in the Solicitation, Bid Specifications or Contract, the quoted Bid price includes all taxes applicable to the transaction.

**b.** Purchases made by the State of New York and certain non-State Authorized Users are exempt from New York State and local sales taxes and, with certain exceptions, federal excise taxes. To satisfy the requirements of the New York State sales tax exemption, either the Purchase Order issued by a State Agency or the invoice forwarded to authorize payment for such purchases will be sufficient evidence that the sale by the Contractor was made to the State, an exempt organization under Section 1116(a)(1) of the Tax Law. Non-State Authorized Users must offer their own proof of exemption upon request. No person, firm or corporation is, however, exempt from paying the State Truck Mileage and Unemployment Insurance or Federal Social Security taxes, which remain the sole responsibility of the Bidder/Contractor.

**c.** Purchases by Authorized Users other than the State of New York may be subject to certain taxes which were not included in the Bid price, and in those instances the tax should be computed based on the Contract price and added to the invoice submitted to such entity for payment.

**9. EXPENSES PRIOR TO CONTRACT EXECUTION** The Commissioner and any Authorized Users are not liable for any costs incurred by a Bidder or Contractor in the preparation and production of a Bid, Mini-Bid, cost proposal revision, or for any work performed prior to Contract execution.

## **10. PRODUCT REFERENCES**

**a. "Or Equal"** In all Solicitations or Bid Specifications, the words "or equal" are understood to apply where a copyrighted, brand name, trade name, catalog reference, or patented Product is referenced.

References to such specific Product are intended as descriptive, not restrictive, unless otherwise stated. Comparable Product will be considered if proof of compatibility is provided, including appropriate catalog excerpts, descriptive literature, specifications and test data, etc. The Commissioner's decision as to acceptance of the Product as equal shall be final.

**b. Discrepancies in References** In the event of a discrepancy between the model number referenced in the Solicitation or Bid Specifications and the written description of the Products that cannot be reconciled, then the written description shall prevail.

**11. REMANUFACTURED, RECYCLED, RECYCLABLE, OR RECOVERED MATERIALS** Upon the conditions specified in the Solicitation and in accordance with the laws of the State of New York, Contractors are encouraged to use recycled, recyclable, or recovered materials in the manufacture of Products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the Product or packaging unless such use is precluded due to health, welfare, safety requirements, or in the Solicitation. Contractors are further encouraged to offer remanufactured Products to the maximum extent practicable without jeopardizing the performance or intended end use of the Product unless such use is precluded due to health, welfare, safety requirements, or by the Solicitation. Where such use is not practical, suitable, or permitted by the Solicitation, Contractor shall deliver new materials in accordance with the "Warranties" set forth below.

Items with recycled, recyclable, recovered, refurbished, or remanufactured content must be identified in the Bid or Bidder will be deemed to be offering new Product.

**12. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS** Bids offering Products that are manufactured or produced in public institutions will be rejected.

## **13. PRICING**

**a. Unit Pricing** If required by the Solicitation, the Bidder should insert the price per unit specified and the price extensions in decimals, not to exceed four places, for each item unless otherwise specified in the Solicitation. In the event of a discrepancy between the unit price and the extension, the unit price shall govern unless, in the sole judgment of the Commissioner, such unit pricing is obviously erroneous.

**b. Net Pricing** Unless otherwise required by the Solicitation, prices shall be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination indicated in the Solicitation or Purchase Order.

**c. "No Charge" Bid** When Bids are requested on a number of Products as a Group or lot, a Bidder desiring to Bid "no charge" on a Product in the Group or lot must clearly indicate such. Otherwise, such Bid may be considered incomplete and be rejected, in whole or in part, at the discretion of the Commissioner.

**d. Educational Pricing** All Products to be supplied for educational purposes that are subject to educational discounts shall be identified in the Bid and such discounts shall be made available to qualifying institutions.

**e. Third Party Financing** If Product acquisitions are financed through any third party financing, Contractor may be required as a condition of Contract award to agree to the terms and conditions of a

“Consent & Acknowledgment Agreement” in a form acceptable to the Commissioner.

**f. Specific price decreases:**

(i) **GSA Changes:** Where net pricing under the Contract is based on an approved GSA schedule, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date the approved GSA schedule pricing decreases during the Contract term; or

(ii) **Commercial Price List Reductions:** Where net pricing under the Contract is based on a discount from Contractor’s list prices, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date Contractor lowers its pricing on its commercial price lists during the Contract term; or

(iii) **Special Offers/Promotions Generally:** Where Contractor generally offers more advantageous special price promotions or special discount pricing to other customers during the Contract term for a similar quantity, and the maximum price or discount associated with such offer or promotion is better than the discount or net pricing otherwise available under this Contract, such better price or discount shall apply for similar quantity transactions under this Contract for the life of such general offer or promotion; and

(iv) **Special Offers/Promotions to Authorized Users:** Contractor may offer Authorized Users, under either this Contract or any other contracting vehicle, competitive pricing which is lower than the net pricing set forth herein at any time during the Contract term and such lower pricing shall not be applied as a global price reduction under the Contract pursuant to the foregoing paragraph (iii).

Unless otherwise specified in the Solicitation, Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific Purchase Order from any Authorized User without being in conflict with, or having any obligation to comply on a global basis with, the terms of this clause.

**g. Cost Proposal Revisions** A Contractor may be solicited prior to Contract award to propose the best possible offer for the Product being bid on, in accordance with State Finance Law Section 163(9)(c). A cost proposal revision must be a lower price than the initial price.

**14. SITE INSPECTION** Where a Site inspection is required, Bidder shall be required to inspect the Site, including environmental or other conditions, for pre-existing deficiencies that may affect the installed Product or that may affect Bidder’s ability to properly deliver, install or otherwise provide the required Product. All inquiries regarding such conditions shall be made in writing. Bidder shall be deemed to have knowledge of any deficiencies or conditions that such inspection or inquiry might have disclosed. Bidder must provide a detailed explanation with its Bid if additional work is required under this clause in order to properly provide the required Product.

**15. PURCHASING CARD** The State’s Purchasing Card program is designed to be an efficient and cost effective way to expedite purchases. The Purchasing Card (also referred to as the Procurement Card) is a credit card that enables Authorized Users to make authorized purchases directly from a Contractor without processing formal Purchase Orders. Purchasing Cards are issued to selected employees who are authorized to make purchases for the Authorized

User. Cardholders can make purchases directly from any Contractor that accepts the Purchasing Card.

## **BID EVALUATION**

**16. BID EVALUATION** The Commissioner reserves the right to accept or reject any and all Bids, or separable portions of Bids, and waive technicalities, irregularities, and omissions if the Commissioner determines the best interests of the State will be served. The Commissioner, in his or her sole discretion, may accept or reject illegible, incomplete or vague Bids, and the Commissioner’s decision shall be final. A conditional or revocable Bid which clearly communicates the terms or limitations of acceptance may be considered, and Contract award may be made in compliance with the Bidder’s conditional or revocable terms in the Bid.

**17. TIE BIDS** In the event two Bids are found to be substantially equivalent, price shall be the basis for determining the award recipient. While prompt payment discounts will not be considered in determining the low Bid, the Commissioner may consider any prompt payment discount in resolving Bids which are otherwise tied. If two or more Bidders submit substantially equivalent Bids as to pricing or other factors, the decision of the Commissioner to award a Contract to one or more of such Bidders shall be final.

**18. QUANTITY CHANGES PRIOR TO AWARD** The Commissioner reserves the right, at any time prior to the award of a specific quantity Contract, to alter in good faith the quantities listed in the Solicitation. In the event such right is exercised, the lowest responsible Bidder meeting the Solicitation requirements will be advised of the revised quantities and afforded an opportunity to extend or reduce its Bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its Bid price may result in the rejection of its Bid and the award of such Contract to the lowest responsible Bidder who accepts the revised qualifications.

**19. TIMEFRAME FOR OFFERS** The Commissioner reserves the right to make awards within 60 days after the date of the Bid opening or such other period of time as set forth in the Solicitation. The Bids must remain firm until a Contract is awarded, but if a Contract is not awarded within 60 days or other time period set forth in the Solicitation, the Bidder may withdraw its Bid any time thereafter by delivering to the Commissioner written notice of the withdrawal of its Bid.

**20. DEBRIEFINGS** Pursuant to Section 163(9)(c) of the State Finance Law, any unsuccessful Bidder may request a debriefing regarding the reasons that the Bid submitted by the Bidder was not selected for award. Requests for a debriefing must be made within 15 calendar days of notification by OGS that the Bid submitted by the Bidder was not selected for award. Requests should be submitted in writing to a designated contact identified in the Solicitation.

**21. CONTRACT PUBLICITY** Any Contractor press or media releases, advertisements, or promotional literature, regardless of the medium, referring to an awarded Contract must be reviewed and approved by the Commissioner prior to issuance. In addition, Contractor shall not use, for any purpose, the New York State of Opportunity registered trademark or the New York State coat of arms without prior written approval from the State.

## TERMS & CONDITIONS

**22. CONTRACT CREATION/EXECUTION** Except for contracts governed by Article 11-B of the State Finance Law, subject to and upon receipt of all required approvals as set forth in the Solicitation, a Contract shall be deemed executed and created with the successful Bidders upon the Commissioner's mailing or electronic communication to the address on the Bid/Contract of: (i) the final Contract Award Notice; (ii) a fully executed Contract; or (iii) a Purchase Order authorized by the Commissioner.

**23. CONTRACT TERM - EXTENSION** In addition to any stated extension periods in the Contract, any Contract or portion thereof awarded by the Commissioner may be extended by mutual agreement of the Commissioner and the Contractor for an additional period of up to one year. Such extension for up to an additional one-year period may be exercised on a month-to-month basis or in other stated periods of time.

**24. OFFICIAL USE ONLY/NO PERSONAL USE** The Contract is only for official use by Authorized Users. Use of the Contract for personal or private purposes is strictly prohibited.

**25. PARTICIPATION IN CENTRALIZED CONTRACTS**

**a. State Agencies** All State Agencies may utilize and purchase under any Centralized Contract let by the Commissioner, unless the Solicitation limits purchases to specific State Agencies.

**b. Non-State Agency Authorized Users** Authorized Users other than State Agencies are permitted to make purchases through Centralized Contracts where permitted by law, the Contract or the Commissioner.

**c. Voluntary Extension** Purchase Orders issued against a Centralized Contract by any Authorized User not provided for in the Contract shall be honored by the Contractor at its discretion and only with the approval of the OGS Commissioner and any other approvals required by law.

**d. Responsibility for Performance** Participation in Centralized Contracts by Authorized Users is permitted upon the following conditions: (i) the responsibility with regard to performance of any contractual obligation, covenant, condition or term thereunder by any Authorized User other than State Agencies shall be borne and is expressly assumed by such Authorized User and not by the State; (ii) a breach of the Contract by any particular Authorized User shall neither constitute nor be deemed a breach of the Contract as a whole which shall remain in full force and effect, and shall not affect the validity of the Contract nor the obligations of the Contractor thereunder respecting non-breaching Authorized Users, whether State or otherwise; (iii) for a breach by an Authorized User other than a State Agency, the State specifically and expressly disclaims any and all liability for such breach; and (iv) each non-State Agency Authorized User and Contractor guarantees to hold the State, its officers, agents and employees harmless from any liability that may be or is imposed by the non-State Agency Authorized User's or Contractor's failure to perform in accordance with its obligations under the Contract.

**e. Contract Migration** Authorized Users holding individual Contracts with a Contractor at the time that Contractor is awarded a Centralized Contract for the same Products shall be permitted to migrate to that Centralized Contract effective with its commencement date. Such migration shall not operate to diminish, alter or eliminate

any right that the Authorized User otherwise had under the terms and conditions of their individual Contract.

**26. MODIFICATION OF CONTRACT TERMS** The terms and conditions set forth in the Contract shall govern all transactions by Authorized Users under this Contract. The Contract may only be modified or amended upon mutual written agreement of the Commissioner and Contractor.

The Contractor may, however, offer any Authorized User more advantageous pricing, payment, or other terms and conditions than those set forth in the Contract. In such event, a copy of such terms shall be furnished to the Authorized User and Commissioner by the Contractor at the time of such offer.

Other than where such terms are more advantageous for the Authorized User than those set forth in the Contract, no alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against an Authorized User unless authorized by the Commissioner or specified in the Contract Award Notification. No such alteration or modification shall be made by unilaterally affixing such terms to Product upon delivery (including, but not limited to, attachment or inclusion of standard pre-printed order forms, product literature, "shrink wrap" terms accompanying software upon delivery, or other documents) or by incorporating such terms onto order forms, Purchase Orders or other documents forwarded by the Contractor for payment, notwithstanding Authorized User's subsequent acceptance of Product, or that Authorized User has subsequently processed such document for approval or payment.

**27. SCOPE CHANGES** The Commissioner reserves the right to require, by written order, changes to the scope of the Contract, provided that such changes do not materially alter the general scope of the Contract. If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under the Contract, whether or not changed by the order, the Commissioner shall, upon notice from Contractor as hereafter stated, make an equitable adjustment in the Contract price, the delivery schedule or both and shall modify the Contract. The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Commissioner decides that the facts justify it, the Commissioner may provide an adjustment without receipt of a notice from Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from proceeding with the Contract as changed.

**28. ESTIMATED/SPECIFIC QUANTITY CONTRACTS**

Estimated quantity contracts, also referred to as indefinite delivery/indefinite quantity contracts, are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity is implied or given.

With respect to any specific quantity stated in the Contract, the Commissioner reserves the right after award to order up to 20% more or less (rounded to the next highest whole number) than the specific quantities called for in the Contract. Notwithstanding the foregoing, the Commissioner may purchase greater or lesser percentages of Contract quantities should the Commissioner and Contractor so agree. Such agreement may include an equitable price adjustment.

**29. EMERGENCY CONTRACTS** In the event that a disaster emergency is declared by Executive Order under Section 28 of Article

2-B of the Executive Law, or the Commissioner determines pursuant to his or her authority under Section 163(10)(b) of the State Finance Law that an emergency exists requiring the prompt and immediate delivery of Product, the Commissioner reserves the right to obtain such Product from any source, including but not limited to this Contract, as the Commissioner in his or her sole discretion determines will meet the needs of such emergency. Contractor shall not be entitled to any claim for lost profits for Product procured from other sources pursuant to this clause. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

**30. PURCHASE ORDERS** Unless otherwise authorized in writing by the Commissioner, no Product is to be delivered or furnished by Contractor until transmittal of an official Purchase Order from the Authorized User. Unless terminated or cancelled pursuant to the authority vested in the Commissioner, Purchase Orders shall be effective and binding upon the Contractor (i) in the case of formal written Purchase Orders, when placed in the mail prior to the termination of the Contract and addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification or (ii) in the case of electronic Purchase Orders or Purchasing Card purchases, when electronically transmitted to the Contractor prior to the termination of the Contract.

All Purchase Orders issued pursuant to a Contract let by the Commissioner must be identified with the appropriate Contract number and, if necessary, required State approvals. As deemed necessary, the Authorized User may confirm pricing and other Product information with the Contractor prior to placement of the Purchase Order. The State reserves the right to require any other information from the Contractor which the State deems necessary in order to complete any Purchase Order placed under the Contract. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the Contractor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of the terms most favorable to the Authorized User. Should an Authorized User add written terms and conditions to the Purchase Order that conflict with the terms and conditions of the Contract, the Contractor has the option of rejecting the Purchase Order within five business days of its receipt but shall first attempt to negotiate the additional written terms and conditions in good faith with the Authorized User, or fulfill the Purchase Order. Notwithstanding the above, the Authorized User reserves the right to dispute any discrepancies arising from the presentation of additional terms and conditions with the Contractor.

If, with respect to an Agency Specific Contract let by the Commissioner, a Purchase Order is not received by the Contractor within two weeks after the issuance of a Contract Award Notification, it is the responsibility of the Contractor to request in writing that the appropriate Authorized User forward a Purchase Order. If, thereafter, a Purchase Order is not received within a reasonable period of time, the Contractor shall promptly notify in writing the appropriate purchasing officer in OGS. Failure to timely notify such officer may, in the discretion of the OGS Commissioner and without cost to the State, result in the cancellation of such requirement by the OGS Commissioner with a corresponding reduction in the Contract quantity and price.

**31. PRODUCT DELIVERY** Delivery must be made as ordered to the address specified on the Purchase Order and in accordance with the terms of the Contract. Delivery shall be made within 30 calendar days after receipt of a Purchase Order by the Contractor, unless otherwise agreed to by the Authorized User and the Contractor. The decision of

the Commissioner as to compliance with delivery terms shall be final. The burden of proof for delay in receipt of a Purchase Order shall rest with the Contractor. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify the Commissioner and the Authorized User, and confirm in writing the explanation of the delay, and take appropriate action to avoid any subsequent late deliveries. Any extension of time for delivery must be requested in writing by the Contractor and approved in writing by the Authorized User. If compliance with the delivery time schedule is a material term of the Contract, failure to meet such delivery time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract.

**32. WEEKEND AND HOLIDAY DELIVERIES** Unless otherwise specified in the Contract or by an Authorized User, deliveries will be scheduled for ordinary business hours, Monday through Friday (excluding legal holidays observed by the State of New York). Deliveries may be scheduled by mutual agreement for Saturdays, Sundays or legal holidays observed by the State of New York where the Product is for daily consumption, an emergency exists, the delivery is a replacement, delivery is late, or other reasonable circumstance in which event the convenience of the Authorized User shall govern.

### **33. SHIPPING/RECEIPT OF PRODUCT**

**a. Packaging** Product shall be securely and properly packed for shipment, storage and stocking in appropriate, clearly labeled shipping containers and according to accepted commercial practice, without any extra charges for packing materials, cases or other types of containers. The container shall become and remain the property of the Authorized User unless otherwise specified in the Contract documents.

**b. Shipping Charges** Unless otherwise stated in the Contract, all deliveries shall be deemed to be freight on board (F.O.B.) destination tailgate delivery at the dock of the Authorized User. Unless otherwise agreed, items purchased at a price F.O.B. shipping point plus transportation charges shall not relieve the Contractor from responsibility for safe and proper delivery notwithstanding the Authorized User's payment of transportation charges. Contractor shall be responsible for ensuring that the bill of lading states "charges prepaid" for all shipments.

**c. Receipt of Product** The Contractor shall be solely responsible for assuring that deliveries are made to the locations and/or personnel specified by the Authorized User in the Purchase Order. Any losses or delays resulting from the Contractor's failure to deliver Product to the specified locations or personnel shall be borne exclusively by the Contractor.

### **34. TITLE AND RISK OF LOSS FOR PRODUCTS OTHER THAN TECHNOLOGY PRODUCTS**

Notwithstanding the form of shipment, title or other property interest, risk of loss for Products other than technology Products shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the Contract or Purchase Order. Mere acknowledgment by Authorized User personnel of the delivery or receipt of goods (e.g., signed bill of lading) shall not be deemed or construed as acceptance of the Products received. Any delivery of Product that is substandard or does not comply with the Contract may be rejected or accepted on an adjusted price basis, as determined by the Commissioner. Title, risk of loss, and acceptance for technology Products shall be governed by the Product Acceptance clause.

**35. PRODUCT SUBSTITUTION** In the event a specified Product listed in the Contract becomes unavailable or cannot be supplied by the Contractor for any reason (except as provided for in the Savings/Force Majeure clause), a Product deemed in writing by the Commissioner to be equal to or better than the specified Product must be substituted by the Contractor at no additional cost or expense to the Authorized User. Unless otherwise specified, any substitution of Product prior to the Commissioner's written approval may be cause for termination of Contract.

**36. REJECTED PRODUCT** When Product is rejected, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of rejection by the Authorized User. Upon notification of rejection, risk of loss of rejected or non-conforming Product shall remain with Contractor. Rejected items not removed by the Contractor within ten calendar days of notification shall be regarded as abandoned by the Contractor, and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any and all costs and expenses incurred in storage or effecting removal or disposition after the ten-calendar-day period.

**37. INSTALLATION** Where installation is required, Contractor shall be responsible for placing and installing the Product in the required locations. All materials used in the installation shall be of good quality and shall be free from any and all defects that would mar the Product or render it unsound. Installation includes the furnishing of any equipment, rigging and materials required to install or place the Product in the proper location. The Contractor shall protect the Site from damage for all its work and shall repair damages or injury of any kind caused by the Contractor, its employees, officers or agents. If any alteration, dismantling or excavation, etc. is required to effect installation, the Contractor shall thereafter promptly restore the structure or Site. Work shall be performed to cause the least inconvenience to the Authorized User and with proper consideration for the rights of other Contractors or workers. The Contractor shall promptly perform its work and shall coordinate its activities with those of other Contractors. The Contractor shall clean up and remove all debris and rubbish from its work as required or directed. Upon completion of the work, the building and surrounding area of work shall be left clean and in a neat, unobstructed condition, and everything in satisfactory repair and order.

**38. REPAIRED OR REPLACED PRODUCTS, PARTS, OR COMPONENTS** Where the Contractor is required to repair, replace or substitute Product or parts or components of the Product under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and conditions for new parts and components set forth in the Contract including warranties, as set forth in the Warranties clause herein. Replaced or repaired Product or parts and components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Remanufactured parts or components meeting new Product standards may be permitted by the Commissioner or Authorized User. Before installation, all proposed substitutes for the original manufacturers' installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

**39. EMPLOYEES, SUBCONTRACTORS AND AGENTS** All employees, Subcontractors, or agents of the Contractor performing work under the Contract must be trained staff or technicians who meet or exceed the professional, technical, and training qualifications set forth in the Contract or the Purchase Order, and must comply with all security and administrative requirements of the Authorized User that are communicated to the Contractor. The Commissioner and the Authorized

User reserve the right to conduct a security background check or otherwise approve any employee, Subcontractor, or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on professional, technical or training qualifications, quality of work or change in security status or non-compliance with Authorized User's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract or the Purchase Order. The Commissioner and the Authorized User reserve the right to reject and/or bar from any facility for cause any employee, Subcontractor, or agent of the Contractor.

**40. ASSIGNMENT** In accordance with Section 138 of the State Finance Law, the Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the Contract or its right, title or interest therein, or its power to execute such Contract to any other person, company, firm or corporation in performance of the Contract without the prior written consent of the Commissioner or Authorized User (as applicable); provided, however, any consent shall not be unreasonably withheld, conditioned, delayed or denied. The Commissioner may waive the requirement that such consent be obtained in advance where the Contractor verifies that the assignment, transfer, conveyance, sublease, or other disposition is due to, but not necessarily limited to, a reorganization, merger, or consolidation of the Contractor's business entity or enterprise.

Notwithstanding the foregoing, the State shall not hinder, prevent or affect assignment of money by a Contractor for the benefit of its creditors. Prior to a consent to assignment of monies becoming effective, the Contractor shall file a written notice of such monies assignments with the State Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request for assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the State Comptroller. Commissioner shall use reasonable efforts to promptly respond to any request by Contractor for an assignment, provided that Contractor supplies sufficient information about the party to whom the Contractor proposes to assign the Contract.

Upon notice to the Contractor, the Contract may be assigned without the consent of the Contractor to another State Agency or subdivision of the State pursuant to a governmental reorganization or assignment of functions under which the functions are transferred to a successor Agency or to another Agency that assumes OGS responsibilities for the Contract.

**41. SUBCONTRACTORS AND SUPPLIERS** The Commissioner reserves the right to reject any proposed Subcontractor or supplier for bona fide business reasons, including, but not limited to: the company failed to solicit New York State certified minority- and women-owned business enterprises as required in prior OGS Contracts; the fact that such Subcontractor or supplier is on the New York State Department of Labor's list of companies with which New York State cannot do business; the Commissioner's determination that the company is not qualified or is not responsible; or the fact that the company has previously provided unsatisfactory work or services.

**42. SUSPENSION OF WORK** The Commissioner, in his or her sole discretion, reserves the right to suspend any or all activities under the Contract, at any time, in the best interests of the Authorized User. In the event of such suspension, the Contractor will be given a formal written notice outlining the particulars of such suspension. Examples of the reason for such suspension include, but are not limited to, a budget freeze or reduction in State spending, declaration of emergency, contract compliance issues or other circumstances. Upon

issuance of such notice, the Contractor is not to accept any Purchase Orders, and shall comply with the suspension order. Activity may resume at such time as the Commissioner issues a formal written notice authorizing a resumption of performance under the Contract.

An Authorized User may issue a formal written notice for the suspension of work for which it has engaged the Contractor for reasons specified in the above paragraph. The written notice shall set forth the reason for such suspension and a copy of the written notice shall be provided to the Commissioner.

#### **43. TERMINATION**

**a. For Cause** For a material breach that remains uncured for more than 30 calendar days or other longer period as specified by written notice to the Contractor, the Contract or Purchase Order may be terminated by the Commissioner or Authorized User respectively. Neither the State nor an Authorized User shall be liable for any of Contractor's costs arising from the failure to perform or the termination, including without limitation costs incurred after the date of termination. Such termination shall be upon written notice to the Contractor. In such event, the Commissioner or Authorized User may complete the contractual requirements in any manner it may deem advisable and pursue available legal or equitable remedies for breach.

**b. For Convenience** This Contract may be terminated at any time by the Commissioner for convenience upon 60 calendar days or other longer period as specified by written notice, without penalty or other early termination charges due. Such termination of the Contract shall not affect any project or Purchase Order that has been issued under the Contract prior to the date of such termination. If the Contract is terminated pursuant to this subdivision, the Authorized User shall remain liable for all accrued but unpaid charges incurred through the date of the termination. Contractor shall use due diligence and fulfill any outstanding Purchase Orders.

**c. For Violation of Sections 139-j and 139-k of the State Finance Law** The Commissioner reserves the right to terminate the Contract in the event it is found that the certification filed by the Bidder in accordance with Section 139-k of the State Finance Law was intentionally false or intentionally incomplete. Upon such finding, the Commissioner may exercise his or her termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.

**d. For Violation of Section 5-a of the New York State Tax Law** The Commissioner reserves the right to terminate the Contract in the event it is found that the certification filed by the Contractor in accordance with Section 5-a of the Tax Law is not timely filed during the term of the Contract or the certification furnished was intentionally false or intentionally incomplete. Upon such finding, the Commissioner may exercise his or her termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.

**e. For Non-Responsibility** The Bidder agrees that if it is found by the State that the Bidder's responses to the Vendor Responsibility Questionnaire were intentionally false or intentionally incomplete, on such finding, the Commissioner may terminate the Contract.

Upon written notice to the Contractor, and a reasonable opportunity to be heard with appropriate OGS officials or staff, the Contract may be terminated by the Commissioner at the Contractor's expense where the Contractor is determined by the Commissioner to be non-responsible. In such event, the Commissioner may complete the contractual

requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

In no case shall such termination of the Contract by the State be deemed a breach thereof, nor shall the State be liable for any damages for lost profits or otherwise, which may be sustained by the Contractor as a result of such termination.

**f. Upon Conviction of Certain Crimes** The Commissioner reserves the right to terminate the Contract in the event it is found that a member, partner, director or officer of Contractor is convicted of one or more of the following: Bribery Involving Public Servants and Related Offenses as defined in Article 200 of the New York State Penal Law; Corrupting the Government as defined in Article 496 of the New York State Penal Law; or Defrauding the Government as defined in Section 195.20 of the New York State Penal Law.

**44. SAVINGS/FORCE MAJEURE** A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.

The affected party shall provide the other party with written notice of any force majeure occurrence as soon as the delay is known and provide the other party with a written contingency plan to address the force majeure occurrence, including, but not limited to, specificity on quantities of materials, tooling, people, and other resources that will need to be redirected to another facility and the process of redirecting them. Furthermore, the affected party shall use its commercially reasonable efforts to resume proper performance within an appropriate period of time. Notwithstanding the foregoing, if the force majeure condition continues beyond 30 days, the parties to the Contract shall jointly decide on an appropriate course of action that will permit fulfillment of the parties' objectives under the Contract.

The Contractor agrees that in the event of a delay or failure of performance by the Contractor under the Contract due to a force majeure occurrence:

- a. The Commissioner may purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the State, or
- b. The Contractor will provide Authorized Users with access to Products first in order to fulfill orders placed before the force majeure event occurred. The Commissioner agrees that Authorized Users shall accept allocated performance or deliveries during the occurrence of the force majeure event.

Neither the Contractor nor the Commissioner shall be liable to the other for any delay in or failure of performance under the Contract due to a force majeure occurrence. Any such delay in or failure of performance shall not constitute default or give rise to any liability for damages. The existence of such causes of such delay or failure shall extend the period for performance to such extent as determined by the Contractor and the Commissioner to be necessary to enable complete performance by the Contractor if reasonable diligence is exercised after the cause of delay or failure has been removed.



Notwithstanding the above, at the discretion of the Commissioner where the delay or failure will significantly impair the value of the Contract to the State or to Authorized Users, the Commissioner may terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

In addition, the Commissioner reserves the right, in his or her sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (i) the volatility is due to causes outside the control of Contractor; (ii) the volatility affects the marketplace or industry, not just the particular Contract source of supply; (iii) the effect on pricing or availability of supply is substantial; and (iv) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss to the Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

#### **45. CONTRACT INVOICING**

**a. Invoicing** Contractor and the dealers/distributors/resellers designated by the Contractor, if any, shall provide complete and accurate billing invoices to each Authorized User in order to receive payment. Billing invoices submitted to an Authorized User must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer.

Contractor shall provide, upon request of the Commissioner, any and all information necessary to verify the accuracy of the billings. Such information shall be provided in a commercially reasonable manner as requested by the Commissioner. The Commissioner may direct the Contractor to provide the information to the State Comptroller or to any Authorized User of the Contract.

**b. Payment of Contract Purchases made by an Authorized User when the State Comptroller is responsible for issuing such payment** The Authorized User and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at [www.osc.state.ny.us](http://www.osc.state.ny.us), by e-mail at [HelpDesk@sfs.ny.gov](mailto:HelpDesk@sfs.ny.gov), or by telephone at (518) 457-7737 or toll free (877) 737-4185. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract that are payable by the State Comptroller if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

**c. Payment of Contract Purchases made by an Authorized User when the State Comptroller is not responsible for issuing such payment** The Authorized User and Contractor agree that payments for such Contract purchases shall be billed directly by Contractor on invoices/vouchers, together with complete and accurate supporting documentation as required by the Authorized User. Such payments shall be as mandated by the appropriate governing law from the receipt

of a proper invoice. Such Authorized User and Contractor are strongly encouraged to establish electronic payments.

#### **46. DEFAULT – AUTHORIZED USER**

**a. Breach by Authorized User** An Authorized User's breach shall not be deemed a breach of the Centralized Contract; rather, it shall be deemed a breach of the Authorized User's performance under the terms and conditions of the Centralized Contract.

**b. Failure to Make Payment** In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within 30 calendar days of such delivery and acceptance, the Contractor may, upon five business days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional provision of Products to such entity until such time as reasonable arrangements have been made and assurances given by such entity for current and future Contract payments.

**c. Notice of Breach** Notwithstanding the foregoing, the Contractor shall, at least 10 business days prior to declaring a breach of Contract by any Authorized User, by certified or registered mail, notify both the Commissioner and the purchasing official of the breaching Authorized User of the specific facts, circumstances and grounds upon which a breach will be declared.

**d. Insufficient basis** If the Contractor's basis for declaring a breach is insufficient, the Contractor's declaration of breach and failure to provide Products to an Authorized User may constitute a breach of the Contract, and the Authorized User may thereafter seek any remedy available at law or equity.

#### **47. PROMPT PAYMENTS**

**a. By State Agencies** Upon acceptance of Product or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be 30 calendar days, excluding legal holidays, from the receipt of a proper invoice, as determined in accordance with State Finance Law Section 179-f(2) and 2 NYCRR Part 18. The payment of interest on certain payments due and owed by the State Agency may be made in accordance with State Finance Law Sections 179-d et seq. and the implementing regulations (2 NYCRR § 18.1 et seq.).

**b. By Non-State Agencies** Upon acceptance of Product or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be 30 calendar days, excluding legal holidays, or as mandated by the appropriate governing law from the receipt of a proper invoice. The terms of Article 11-A of the State Finance Law apply only to procurements by and the consequent payment obligations of State Agencies. Neither expressly nor by any implication is the statute applicable to non-State agency Authorized Users. Neither OGS nor the State Comptroller is responsible for payments on any purchases made by a non-State agency Authorized User.

**c. By Contractor** Should the Contractor be liable for any payments to the State hereunder, interest, late payment charges and collection fee charges will be determined and assessed pursuant to Section 18 of the State Finance Law.

**48. REMEDIES FOR BREACH** Unless otherwise specified by the Authorized User in a Mini-Bid or Purchase Order, in the event that Contractor fails to observe or perform any term or condition of the Contract and such failure remains uncured after 15 calendar days following written notice by the Commissioner or an Authorized User,



the Commissioner or an Authorized User may exercise all rights and remedies available at law or in equity. Notwithstanding the foregoing, if such failure is of a nature that it cannot be cured completely within 15 calendar days and Contractor shall have commenced its cure of such failure within such period and shall thereafter diligently prosecute all steps necessary to cure such failure, such 15-day period may, in the sole discretion of the Commissioner or the Authorized User, be extended for a reasonable period in no event to exceed 60 calendar days. It is understood and agreed that the rights and remedies available to the Commissioner and Authorized Users in the event of breach shall include but not be limited to the following:

**a. Cover/Substitute Performance** In the event of Contractor's material, uncured breach, the Commissioner or Authorized User may, with or without issuing a formal Solicitation: (i) purchase from other sources; or (ii) if the Commissioner or Authorized User is unsuccessful after making reasonable attempts, under the circumstances then-existing, to timely obtain acceptable replacement Product of equal or comparable quality, the Commissioner or Authorized User may acquire acceptable replacement Product of lesser or greater quality. Such purchases may be deducted from the Contract quantity without penalty or liability to the State.

**b. Withhold Payment** In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Authorized User.

**c. Bankruptcy** In the event that the Contractor files, or there is filed against Contractor, a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise their right to set-off against monies due the debtor or, under the doctrine of recoupment, be credited the amounts owed by the Contractor arising out of the same transactions.

**d. Reimbursement of Costs Incurred** The Contractor agrees to reimburse the Authorized User promptly for any and all additional costs and expenses incurred for acquiring acceptable replacement Product. Should the cost of cover be less than the Contract price, the Contractor shall have no claim to the difference. The Contractor covenants and agrees that in the event suit is successfully prosecuted for any default on the part of the Contractor, all costs and expenses, including reasonable attorney's fees, shall be paid by the Contractor.

Where the Contractor fails to timely deliver pursuant to the guaranteed delivery terms of the Contract, the ordering Authorized User may obtain replacement Product temporarily and the cost of the replacement Product shall be deducted from the Contract quantity without penalty or liability to the State.

**e. Deduction/Credit** Sums due as a result of these remedies may be deducted or offset by the Authorized User from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, damages, etc., that arise from the administration of the Contract.

**49. ASSIGNMENT OF CLAIM** Contractor hereby assigns to the State any and all claims for overcharges associated with this Contract that may arise under the antitrust laws of the United States, 15 USC

Section 1, et seq. and the antitrust laws of the State of New York, General Business Law Section 340, et seq.

**50. TOXIC SUBSTANCES** Each Contractor furnishing a toxic substance, as defined by Section 875 of the Labor Law, shall provide such Authorized User with not less than two copies of a Safety Data Sheet, which sheet shall include for each such substance the information outlined in Section 876 of the Labor Law.

Before any chemical product is used or applied on or in any building, a copy of the product label and Safety Data Sheet must be provided to and approved by the Authorized User.

**51. INDEPENDENT CONTRACTOR** It is understood and agreed that the legal status of the Contractor, its Subcontractors, agents, officers and employees under this Contract is that of an independent contractor, and in no manner shall they be deemed employees of the Authorized User, and therefore are not entitled to any of the benefits associated with such employment.

**52. SECURITY** Contractor warrants, covenants and represents that, in the performance of the Contract, Contractor, its agents, Subcontractors, officers, distributors, resellers and employees will comply fully with all security procedures of the Authorized User set forth in the Contract or Purchase Order or otherwise communicated in advance to the Contractor including but not limited to physical, facility, documentary and cyber security rules, procedures and protocols.

**53. COOPERATION WITH THIRD PARTIES** The Contractor shall be responsible for fully cooperating with any third party, including but not limited to other Contractors or Subcontractors of the Authorized User, as necessary to ensure delivery or performance of Product.

#### **54. WARRANTIES**

**a. Product Performance** Contractor hereby warrants and represents that the Products acquired by the Authorized User under this Contract conform to the manufacturer's specifications, performance standards and Documentation and that the Documentation fully describes the proper procedure for using the Products.

**b. Title and Ownership** Contractor warrants and represents that it has (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver specified license rights to any Products acquired by Authorized User under this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor shall indemnify Authorized Users and hold Authorized Users harmless from any damages and liabilities (including reasonable attorneys' fees and costs) arising from any breach of Contractor's warranties as set forth herein.

**c. Product Warranty** Contractor further warrants and represents that Products, components or parts specified and furnished by or through Contractor, whether specified and furnished individually or as a system, shall be substantially free from defects in material and workmanship and will conform to all requirements of the Contract for the manufacturer's standard commercial warranty period, if applicable, or for a minimum of one year from the date of acceptance, whichever is longer (the "Product warranty period").

During the Product warranty period, defects in the materials or workmanship of Products, components, or parts specified and furnished by or through Contractor, whether specified and furnished

individually or as a system, shall be repaired or replaced by Contractor at no cost or expense to the Authorized User. Contractor shall extend the Product warranty period for individual Products, or for the system as a whole, as applicable, by the cumulative periods of time, after notification, during which an individual Product, or the system as a whole, requires repairs or replacement resulting in down time or is in the possession of the Contractor, its agents, officers, Subcontractors, distributors, resellers or employees ("extended warranty").

Any component or part replaced by the Contractor under the Contract warranties shall be guaranteed for the greater of: (i) the Product warranty period set forth herein; or (ii) the manufacturer's standard commercial warranty period offered for the component or part, if applicable.

All costs for materials, labor, and transportation incurred to repair or replace Products, parts, components, or systems as a whole during the warranty period shall be borne solely by the Contractor, and the State or Authorized User shall in no event be liable or responsible therefor.

Where Contractor, the Third-Party Software vendor, or other third-party manufacturer markets any Product delivered by or through Contractor with a standard commercial warranty, such standard warranty shall be in addition to, and not relieve the Contractor from, Contractor's warranty obligations during the Product warranty and extended warranty periods. Where such standard commercial warranty covers all or some of the Product warranty or extended warranty periods, Contractor shall be responsible for the coordination during the Product warranty or extended warranty periods with Third-Party Software vendor or other third-party manufacturers for warranty repair or replacement of Third-Party Software vendor or other third-party manufacturer's Product.

Where Contractor, Third-Party Software vendor, or other third-party manufacturer markets any Product with a standard commercial warranty that goes beyond the Product warranty or extended warranty periods, Contractor shall notify the Authorized User and pass through the standard commercial warranty to Authorized User at no additional charge; provided, however, that Contractor shall not be responsible for coordinating services under the standard commercial warranty after expiration of the Product warranty and extended warranty periods.

Unless recycled, recyclable, or recovered materials are available in accordance with the Remanufactured, Recycled, Recyclable, or Recovered Materials clause, Product offered shall be standard new equipment, current model or most recent release of regular stock product with all parts regularly used with the type of equipment offered. Contractor further warrants and represents that no component or part has been substituted or applied contrary to the manufacturer's recommendations and standard practice.

Contractor shall not be responsible for any modification of the Products made by an Authorized User without Contractor's approval.

**d. Virus Warranty** The Contractor represents and warrants that any Product acquired under the Contract by the Authorized User does not contain any known Viruses. Contractor is not responsible for Viruses introduced at an Authorized User's Site.

**e. Date/Time Warranty** Contractor warrants that Product furnished pursuant to this Contract shall, when used in accordance with the Product Documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) transitions, including leap year calculations. Where a Contractor proposes or an

acquisition requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system.

Where Contractor is providing ongoing services, including but not limited to: (i) consulting, integration, code or data conversion, (ii) maintenance or support services, (iii) data entry or processing, or (iv) contract administration services (e.g., billing, invoicing, claim processing), Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure or error due to the inaccuracy of Contractor's business operations in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) various date/time transitions, including leap year calculations. Contractor shall be responsible for damages resulting from any delays, errors or untimely performance resulting therefrom, including but not limited to the failure or untimely performance of such services.

**f. Workmanship Warranty** Contractor warrants that the services acquired under this Contract will be provided in a professional and workmanlike manner in accordance with the applicable industry standards, if any. The Authorized User must notify Contractor of any services warranty deficiencies within 90 calendar days from performance of the services that gave rise to the warranty claim.

**g. Survival of Warranties** All warranties contained in this Contract shall survive the termination of this Contract.

**h. Prompt Notice of Breach** The Authorized User shall promptly notify the Contractor and the Commissioner in writing of any claim of breach of any warranty provided herein.

**i. Additional Warranties** Where Contractor, Product manufacturer or service provider generally offers additional or more advantageous warranties than those set forth herein, Contractor shall offer or pass through any such warranties to Authorized Users.

**j. No Limitation of Rights** The rights and remedies of the State and the Authorized Users provided in this clause are in addition to and do not limit any rights afforded to the State and the Authorized Users by any other clause of the Contract.

**55. LEGAL COMPLIANCE** Contractor represents and warrants that it shall secure all notices and comply with all applicable laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any extensions thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Solicitation and Contract and any applicable laws, including but not limited to, permits, licensing, and shall provide such proof as required by the Commissioner. Failure to comply or failure to provide proof may constitute grounds for the Commissioner to terminate or suspend the Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

**56. INDEMNIFICATION** Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold the Authorized Users harmless from suits, actions, proceedings, claims, losses, damages, and costs (including reasonable attorney fees) of every name and description relating to personal injury and damage to real or personal tangible property caused by any intentional act or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from this Contract, without limitation;

provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Authorized User.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, or other suit for which Contractor is required to fully indemnify an Authorized User, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

In the event that an action or proceeding at law or in equity is commenced against the Authorized User arising out of a claim for death, personal injury or damage to real or personal tangible property caused by any intentional or willful act, gross negligence, or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from the Products supplied under this Contract, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters.

#### **57. INDEMNIFICATION RELATING TO INFRINGEMENT**

The Contractor shall also defend, indemnify and hold the Authorized Users harmless from all suits, actions, proceedings, claims, losses, damages, and costs of every name and description (including reasonable attorney fees), relating to a claim of infringement of a patent, copyright, trademark, trade secret or other proprietary right provided such claim arises solely out of the Products as supplied by the Contractor, and not out of any modification to the Products made by the Authorized User or by someone other than Contractor at the direction of the Authorized User without Contractor's approval; provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Authorized User.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit alleging infringement, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

If usage of a Product shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its

own expense and sole discretion to take action in the following order of precedence: (i) to procure for the Authorized User the right to continue usage (ii) to modify the service or Product so that usage becomes non-infringing, and is of at least equal quality and performance; or (iii) to replace such Product or parts thereof, as applicable, with non-infringing Product of at least equal quality and performance. If the above remedies are not available, the parties shall terminate the Contract, in whole or in part as necessary and applicable, provided that the Authorized User is given a refund for any amounts paid for the period during which usage was not feasible.

In the event that an action or proceeding at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters. This constitutes the Authorized User's sole and exclusive remedy for infringement of a patent, copyright, trademark, trade secret, or other proprietary right.

**58. LIMITATION OF LIABILITY** Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Infringement clause, the limit of liability shall be as follows:

a. Contractor's liability for any claim, loss or liability arising out of, or connected with the Products provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Products forming the basis of the Authorized User's claim or (ii) five hundred thousand dollars (\$500,000), whichever is greater.

b. The Authorized User may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted against the Authorized User unless Contractor at the time of the presentation of claim shall demonstrate to the Authorized User's satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.

c. Notwithstanding the above, neither the Contractor nor the Authorized User shall be liable for any consequential, indirect or special damages of any kind which may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by the Authorized User, the Contractor, or by others.

#### **59. DISPUTE RESOLUTION PROCEDURES**

It is the policy of OGS to provide interested parties, as defined in the OGS Dispute Resolution Procedures, with an opportunity to

administratively resolve disputes, complaints or inquiries related to Solicitations, contract awards and contract administration. OGS encourages interested parties to seek resolution of disputes through consultation with OGS staff. All such matters shall be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of the OGS Dispute Resolution Procedures may be obtained by contacting the designated contact for the Solicitation, the Contract manager, or at the OGS website. OGS reserves the right to change the procedures set forth in the Dispute Resolution Procedures without seeking a Contract amendment.

*To the extent the scope of the Solicitation or Contract includes the sale, development, maintenance, or use of information technology Products such as software, computer components, systems, or networks for the processing, and distribution, or storage, or storage of data, the following clauses shall govern, as applicable.*

**60. SOFTWARE LICENSE GRANT** Where Product is acquired on a licensed basis the following shall constitute the license grant:

**a. License Scope** Licensee is granted a non-exclusive, perpetual license to use, execute, reproduce, display, perform, or merge the Product within its business enterprise in the United States up to the maximum licensed capacity stated on the Purchase Order. Product may be accessed, used, executed, reproduced, displayed or performed up to the capacity measured by the applicable licensing unit stated on the Purchase Order (e.g., payroll size, number of employees, CPU, MIPS, MSU, concurrent user, workstation, virtual partition). Licensee shall have the right to use those modifications or customizations of the Product that have been purchased by Licensee and to distribute such modifications or customizations for use by any Authorized Users otherwise licensed to use the Product, provided that any modifications or customizations, however extensive, shall not diminish Licensor's proprietary title or interest. No license, right or interest in any trademark, trade name, or service mark is granted hereunder.

Licensee and Contractor may agree to alternative licensing rights (e.g., subscription, term, virtual) for specific Products used by the Contractor in performing the services, provided such agreement is reached prior to Bid, Mini-Bid, RFQ, or Contract award, as applicable. Such licensing rights will be specified in an applicable Purchase Order or other document approved by Licensee and Contractor.

**b. License Term** The license term shall commence upon the License Effective Date, provided, however, that where an acceptance or trial period applies to the Product, the license term shall be extended by the time period for testing, acceptance or trial.

**c. Product Documentation** Contractor shall provide Product Documentation electronically to Licensee at no charge. If Product Documentation is made available to customers in hard copy, Contractor shall provide at no charge one hard copy.

Contractor hereby grants to Licensee a non-exclusive, fully paid-up, royalty-free perpetual license in the Product Documentation to make, reproduce, and distribute, either electronically or otherwise, copies of the Product Documentation as necessary to enjoy full use of the Product in accordance with the Contract.

**d. Product Technical Support & Maintenance** Licensee shall have the option of electing the Product technical support and maintenance ("maintenance") set forth in the Contract by giving written notice to Contractor any time during the Centralized Contract term. Contractor shall fully disclose all terms and conditions of maintenance available to Licensee, including the extent to which updates, upgrades, revisions, and new releases are included in maintenance. Maintenance terms and any renewals thereof are independent of the expiration of the Centralized Contract term and shall not automatically renew.

Unless otherwise provided by written agreement between the Contractor and Licensee, maintenance offered shall include, at a minimum, (i) the provision of Error Corrections, updates, enhancements, revisions, Patches, and upgrades to Licensee, and (ii) help desk assistance at no additional cost, either by toll-free telephone

or on-line functionality. Contractor shall maintain the Product so as to provide Licensee with the ability to utilize the Product in accordance with the Product Documentation without significant functional downtime to its ongoing business operations during the maintenance term.

Licensee shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon notice to Contractor. In the event that Licensee does not initially acquire or discontinue maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges, by paying Contractor the amount that would have been due under the Contract for the period of time that such maintenance had lapsed, at then current NYS net maintenance rates. Contractor shall submit written notification to Licensees of the upcoming maintenance end date no later than 60 calendar days prior to such maintenance end date.

**e. Permitted License Transfers** As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated Site not originally specified in the license, including transfers within Agencies, between Agencies, and pursuant to governmental restructuring or reorganization ("permitted license transfers"). Licensees do not have to obtain the approval of Contractor for permitted license transfers, but must give 30 days prior written notice to Contractor of such moves and certify in writing that the Product is not in use at the prior Site. There shall be no additional license or other transfer fees due Contractor, provided that: (i) the maximum capacity of the consolidated machine is equal to the combined individual license capacity of all licenses running at the consolidated or transferred Site (e.g., named users, seats, or MIPS); or (ii) if the maximum capacity of the consolidated machine is greater than the individual license capacity being transferred, a logical or physical partition or other means of restricting access will be maintained within the computer system so as to restrict use and access to the Product to that unit of licensed capacity solely dedicated to beneficial use for Licensee. In the event that the maximum capacity of the consolidated machine is greater than the combined individual license capacity of all licenses running at the consolidated or transferred Site, and a logical or physical partition or other means of restricting use is not available, the fees due Contractor shall not exceed the fees otherwise payable for a single license for the upgrade capacity.

**f. Restricted Use By Third Parties** Third parties retained by Licensee shall have the right to use the Product to maintain Licensee's business operations, including data processing, for the time period that they are engaged in such activities, provided that: (i) Licensee gives notice to Contractor of such third party, Site of intended use of the Product, and means of access; and (ii) such third party has executed, or agrees to execute, the Product manufacturer's standard nondisclosure or restricted use agreement, which executed agreement shall be accepted by the Contractor ("Non-Disclosure Agreement"); and (iii) such third party maintains a logical or physical partition within its computer system so as to restrict use and access to the program to that portion solely dedicated to beneficial use for Licensee. In no event shall Licensee assume any liability for third party's compliance with the terms of the Non-Disclosure Agreement, nor shall the Non-Disclosure Agreement create or impose any liabilities on the State or Licensee.

**g. Archival Back-Up and Disaster Recovery** Licensee may use and copy the Product and related Documentation in connection with: (i) reproducing a reasonable number of copies of the Product for

archival backup and disaster recovery procedures; (ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage; (iii) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed herein. The phrase "cold site storage" means a restorable back-up copy of the Product not to be installed until the need for disaster recovery arises. The phrase "disaster recovery" means the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development. Contractor shall fully disclose all archival back-up and disaster recovery options available to Licensee (e.g., cold, warm, and hot back-up), including all terms and conditions, additional charges, or use authorizations associated with such options.

**h. Confidentiality Restrictions** If any portion of the Product or Product Documentation contains confidential, proprietary, or trade secret information, the Contractor shall identify such information in writing to the Licensee. The terms of Licensee's use and disclosure of such information shall be governed by a written agreement between the Contractor and the Licensee, which, in the case of Licensees that are State or local governmental entities, recognizes that they are subject to the New York Freedom of Information Law.

**i. Restricted Use by Licensee** Except as expressly authorized by the Terms of License, Licensee shall not: (i) copy the Product; (ii) cause or permit reverse compilation or reverse assembly of all or any portion of the Product; or (iii) export the Licensed Software in violation of the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR).

**61. PRODUCT ACCEPTANCE** Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, an Authorized User shall have 30 days from the date of delivery to accept hardware Products and 60 days from the date of delivery to accept all other Product. Where the Contractor is responsible for installation, acceptance shall be from completion of installation. Title or other property interest and risk of loss shall not pass from Contractor to the Authorized User until the Products have been accepted. Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User as of the expiration of that period. The license term shall be extended by the time periods allowed for trial use, testing and acceptance.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User shall have the option to run testing on the Product prior to acceptance, such tests and data to be specified by Authorized User. Where using its own data or tests, Authorized User must have the tests or data available upon delivery. This demonstration will take the form of a documented installation test, capable of observation by the Authorized User, which shall be made part of the Contractor's standard documentation and shall be covered by the Product warranty. The test data shall remain accessible to the Authorized User after completion of the test.

In the event that the documented installation test cannot be completed successfully within the specified acceptance period, and the Contractor or Product is responsible for the delay, Authorized User shall have the option to cancel the order in whole or in part, or to extend the testing period for an additional 30 day increment. Authorized User shall notify Contractor of acceptance upon successful completion of the documented installation test. Such cancellation shall not give rise to any cause of action against the Authorized User for damages, loss of profits, expenses, or other remuneration of any kind.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, if the Authorized User elects to provide a deficiency statement specifying how the Product fails to meet the specifications within the testing period, Contractor shall have 30 days to correct the deficiency, and the Authorized User shall have an additional 60 days to evaluate the Product as provided herein.

If the Product does not meet the specifications at the end of the extended testing period, Authorized User, upon prior written notice to Contractor, may then reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by the Authorized User to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to the amounts set forth in the Limitation of Liability clause for any liability for costs incurred at the direction or recommendation of Contractor. When Product is not accepted, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of non-acceptance by the Authorized User. Rejected items not removed by the Contractor within the ten calendar day period shall be regarded as abandoned by the Contractor and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any costs incurred in storage or effecting removal or disposition after the ten calendar day period.

**62. AUDIT OF LICENSED PRODUCT USAGE** Contractor shall have the right to periodically audit, no more than annually, at Contractor's expense, use of licensed Product at any Site where a copy of the Product resides. Contractor may conduct such audits remotely or on Site. If conducted remotely and if Contractor makes a license management program available, the Licensee agrees to install such program and use it within a reasonable period of time, provided such program meets Licensee's security or other requirements. If conducted on Site: (i) Contractor shall give Licensee at least 30 days advance written notice, (ii) such audit shall be conducted during Licensee's normal business hours, (iii) the audit shall be conducted by an independent auditor chosen on mutual agreement of the parties. Contractor shall recommend a minimum of three auditing/accounting firms from which the Licensee will select one; and (iv) Contractor and Licensee are each entitled to designate a representative who shall be entitled to participate, and who shall mutually agree on audit format, and simultaneously review all information obtained by the audit. Such representatives also shall be entitled to copies of all reports, data or information obtained from the audit. If the audit shows that such party is not in compliance, Licensee shall be required to purchase additional licenses or capacities necessary to bring it into compliance and shall pay for the unlicensed capacity at the net pricing in effect under the Contract at time of audit, or if none, then at the Contractor's U.S. commercial list price. Once such additional licenses or capacities are purchased, Licensee shall be deemed to have been in compliance retroactively, and Licensee shall have no further liability of any kind for the unauthorized use of the software.

In the event of an on-Site audit, the Software Alliance, Software Publishers Association (SPA), Software and Industry Information Association (SIIA) or Federation Against Software Theft (FAST) may not be used directly or indirectly to conduct such audit, nor may such entities be recommended by Contractor.

### **63. NO HARDSTOP OR PASSIVE LICENSE MONITORING**

Unless otherwise expressly agreed to by the Licensee, the Product and all upgrades shall not contain any computer code that would disable the Product or upgrades or impair in any way its operation based on the elapsing of a period of time, exceeding an authorized number of copies, advancement to a particular date or other numeral, or other similar self-destruct mechanisms (sometimes referred to as "time bombs," "time locks," or "drop dead" devices) or that would permit Contractor to access the Product to cause such disablement or impairment (sometimes referred to as a "trap door" device). Any Contractor access to the Product agreed to by Licensee as provided above shall be in accordance with Licensee's security or other requirements. Contractor agrees that in the event of a breach of this provision that Licensee shall not have an adequate remedy at law, including monetary damages, and that Licensee shall consequently be entitled to seek a temporary restraining order, injunction, or other form of equitable relief against the continuance of such breach, in addition to any and all remedies to which Licensee shall be entitled.

### **64. OWNERSHIP/TITLE TO PROJECT DELIVERABLES**

This clause shall apply where Contractor is commissioned by the Authorized User to furnish project deliverables as detailed in the Purchase Order.

#### **a. Definitions**

(i) For purposes of this clause, "Products" means deliverables furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on electronic media c) Third-Party Software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, Source Code, object code).

(ii) For purposes of this clause, "Existing Products" means tangible Products and intangible licensed Products that exist prior to the commencement of work under the Contract. Contractor bears the burden of proving that a particular product was in existence prior to the commencement of the project.

(iii) For purposes of this clause, "Custom Products" means Products, preliminary, final, or otherwise, that are created or developed by Contractor, its Subcontractors, partners, employees, or agents for Authorized User under the Contract.

**b. Title to Project Deliverables** Unless otherwise specified in writing in the Purchase Order, the Authorized User shall have ownership and license rights as follows:

#### **(i) Existing Products:**

**1. Hardware** - Title and ownership of Existing hardware Products shall pass to Authorized User upon acceptance.

**2. Software** - Title and ownership to Existing software Products delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other Third-Party Software vendor ("Existing Licensed Product"), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with Contractor or the Third-Party Software vendor. Effective upon acceptance, such Product shall be licensed to Authorized User in accordance with the Contractor or Third-Party Software vendor's standard license

agreement; provided, however, that such standard license, must, at a minimum: (a) grant Authorized User a non-exclusive, perpetual license to use, execute, reproduce, display, perform, adapt (unless Contractor advises Authorized User as part of Contractor's proposal that adaptation will violate existing agreements or statutes and Contractor demonstrates such to the Authorized User's satisfaction) and distribute Existing Licensed Product to the Authorized User up to the license capacity stated in the Purchase Order or work order with all license rights necessary to fully effect the general business purposes stated in the Solicitation or Authorized User's Purchase Order or work order, including the financing assignment rights set forth in paragraph (c) below; and (b) recognize the State of New York as the Licensee where the Authorized User is a State Agency, department, board, commission, office or institution. Where these rights are not otherwise covered by the Third-Party Software vendor's standard license agreement, the Contractor shall be responsible for obtaining these rights at its sole cost and expense. The Authorized User shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this clause.

**(ii) Custom Products:** Effective upon creation of Custom Products, Contractor hereby conveys, assigns and transfers to Authorized User the sole and exclusive rights, title and interest in Custom Products, whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or Subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a Purchase Order, project definition or work order in the course of Contractor's business. Authorized User may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of Authorized User taking exclusive ownership and title to such Products. In such case, Licensee on behalf of all Authorized Users shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purposes as stated in paragraph (b)(i)(2), above.

**c. Transfers or Assignments to a Third-Party Financing Agent** It is understood and agreed by the parties that a condition precedent to the consummation of the purchases under the Contract may be the obtaining of acceptable third-party financing by the Authorized User. The Authorized User shall make the sole determination of the acceptability of any financing proposal. The Authorized User will make all reasonable efforts to obtain such financing, but makes no representation that such financing has been obtained as of the date of Bid receipt. Where financing is used, Authorized User may assign or transfer its rights in Licensed Products (existing or custom) to a third-party financing entity or trustee ("Trustee") as collateral where required by the terms of the financing agreement. Trustee's sole rights with respect to transferability or use of Licensed Products shall be to exclusively sublicense to Authorized User all of its Licensee's rights under the terms and conditions of the License Agreement; provided, further, however, in the event of any termination or expiration of such sublicense by reason of payment in full, all of Trustee's rights in such Licensed Product shall terminate immediately and Authorized User's prior rights to such Existing Licensed Product shall be revived.

**d. Sale or License of Custom Products Involving Tax-Exempt Financing (i.e., Certificates of Participation - COPS)** The Authorized User's sale or other transfer of Custom Products which were acquired by the Authorized User using third-party, tax-exempt financing may not

occur until such Custom Products are, or become, useable. In the event that the Contractor wishes to obtain ownership rights to Custom Products, the sale or other transfer shall be at fair market value determined at the time of such sale or other transfer, and must be pursuant to a separate written agreement in a form acceptable to the Authorized User which complies with the terms of this clause.

**e. Contractor's Obligation with Regard to Third-Party Software** Where Contractor furnishes Existing Licensed Products as a project deliverable, and sufficient rights necessary to effect the purposes of this section are not otherwise provided in the Contractor or the Third-Party Software vendor's standard license agreement, Contractor shall be responsible for obtaining from the Third-Party Software proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

**65. PROOF OF LICENSE** The Contractor must provide to each Licensee who places a Purchase Order either: (i) the Product developer's certified license confirmation certificates in the name of such Licensee; (ii) a written confirmation from the proprietary owner accepting Product invoice as proof of license; or (iii) other similar proof of license. All proofs of license must be in a form acceptable to the Licensee.

## **66. CHANGES TO PRODUCT OR SERVICE OFFERINGS**

**a. Product or Service Discontinuance** Where Contractor is the Product manufacturer/developer, and Contractor publicly announces to all U.S. customers ("date of notice") that a Product is being withdrawn from the U.S. market or that maintenance service or technical support provided by Contractor ("withdrawn support") is no longer going to be offered, Contractor shall be required to: (i) notify the Commissioner and each Licensee then under contract for maintenance or technical support in writing of the intended discontinuance; and (ii) continue to offer Product or withdrawn support upon the Contract terms previously offered for the greater of: (a) the best terms offered by Contractor to any other similarly situated, supported customer, or (b) not less than 12 months from the date of notice; and (iii) at Licensee's option, and in order to enable Licensee to continue the use and maintenance of the Product, provide Licensee with a Product replacement or migration path with at least equivalent functionality at no additional charge, provided that Licensee is under contract for maintenance on the date of notice and Contractor is offering such replacement or migration path to all of its similarly situated, supported customers without additional charge.

In the event that the Contractor is not the Product manufacturer, Contractor shall be required to: (i) provide the notice required under the paragraph above, to the entities described within five business days of Contractor receiving notice from the Product manufacturer, and (ii) include in such notice the period of time from the date of notice that the Product manufacturer will continue to provide Product or withdraw support.

The provisions of this subdivision (a) shall not apply or eliminate Contractor's obligations where withdrawn support is being provided by an independent Subcontractor. In the event that such Subcontractor ceases to provide service, Contractor shall be responsible for subcontracting such service, subject to State approval, to an alternate Subcontractor.

**b. Product or Service Re-Bundling** In the event that Contractor is the Product manufacturer and publicly announces to all U.S. customers ("date of notice") that a Product or maintenance or technical support offering is being re-bundled in a different manner from the structure or licensing model of the prior U.S. commercial offering, Contractor shall

be required to: (i) notify the Commissioner and each Licensee in writing of the intended change; (ii) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered on the then-current NYS Contract for the greater of: (a) the best terms offered by Contractor to any other similarly situated, supported customer, or (b) not less than 12 months from the date of notice; and (iii) shall submit the proposed rebundling change to the Commissioner for approval prior to its becoming effective for the remainder of the Contract term. The provisions of this section do not apply if the Contractor is not the Product manufacturer.



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